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No. 96-___

In The

Supreme Court of the United States

October Term, 1996

M. BRUCE MEADOWS, Secretary of the State Board of Elections and CURTIS W. HARRIS, et al.,

Appellants,

v.

DONALD MOON, et al.,

Appellees.

On Appeal From A Three-Judge Panel Of The United States District Court For The Eastern District Of Virginia

JURISDICTIONAL STATEMENT ON BEHALF OF M. BRUCE MEADOWS

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QUESTIONS PRESENTED

1. Did the district court err by substituting its judgment for the Virginia legislature and rejecting the state's adopted hierarchy of districting principles, where Virginia's own, well-defined districting principles were not substantially disregarded by the legislature, and race was not given quantitatively greater consideration in drawing the district?

2. Did the district court err in finding Virginia has no compelling state interest to draw an effective minority district in the area of the Third Congressional District, where African-Americans reside in numbers sufficient to constitute a majority in a Congressional district, and in most cases, African-Americans who are candidates of choice of the African-American voters cannot be elected due to white bloc voting, in violation of § 2 of the Voting Rights Act?

3. Did the district court err in concluding that Virginia's Third Congressional District was not narrowly tailored by failing to afford deference to the Virginia legislature's race-conscious effort to remedy unlawful vote dilution in the area of the Third District?

PARTIES TO THE PROCEEDING

The actual parties to the proceeding in the United States District Court were:

1. Donald Moon, appellee herein.

2. Robert Smith, appellee herein.

3. M. Bruce Meadows, in his official capacity as Secretary of the State Board of Elections, appellant herein.

4. Curtis W. Harris, Defendant-Intervenor, appellant herein.

5. Jayne W. Barnard, Defendant-Intervenor, appellant herein.

6. Jean Patterson Boone, Defendant-Intervenor, appellant herein.

7. Raymond H. Boone, Defendant-Intervenor, appellant herein.

8. Willie J. Dell, Defendant-Intervenor, appellant herein.

9. Henry C. Garrard, Sr., Defendant-Intervenor, appellant herein.

10. Walter J. Kenney, Sr., Defendant-Intervenor, appellant herein.

11. Melvin R. Simpson, Defendant-Intervenor, appellant herein.

12. Gerald T. Zerkin, Defendant-Intervenor, appellant herein.

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JURISDICTIONAL STATEMENT

M. Bruce Meadows, in his official capacity as Secretary of the State Board of Elections of the Commonwealth of Virginia, appeals from a final judgment of the three-judge United States District Court for the Eastern District of Virginia, dated February 7, 1997, declaring the Third Congressional District for the Commonwealth of Virginia to be violative of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, and enjoining any further elections in the Third Congressional District until a new districting plan is adopted for that district which conforms to all requirements of law.

OPINION BELOW

The February 7, 1997, opinion of the three-judge United States District Court for the Eastern District of Virginia appears in the Appendix to this Jurisdictional Statement ("J.S. App."), J.S. App. 3-33, is reported at *Moon v. Meadows*, 952 F. Supp. 1141 (E.D. Va. 1997), and also is available on LEXIS at 1997 U.S. Dist. LEXIS 1560. The district court's order dated February 7, 1997, entering declaratory and injunctive relief appears in J.S. App. 1-2.

JURISDICTION

The judgment holding that the Third Congressional District violates the Fourteenth Amendment to the United States Constitution was entered on February 7, 1997. Appellant filed a Notice of Appeal to this Court on March 7, 1997. (J.S. App. 34.) This appeal is being docketed within 60 days of March 7, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Equal Protection Clause of the Fourteenth Amendment; the Voting Rights Act as amended, 42 U.S.C. § 1973, *et. seq.*; 65 Fed. Reg. 9897, subjecting the State of Virginia to the preclearance requirements of the Voting Rights Act; Va. Const.

Art. II, § 6 setting forth requirements for creating Congressional districts; and 1991 Va. Acts of Assembly, Special Session II, Ch. 6, and 1993 Va. Acts of Assembly, Ch. 983, enacting Virginia's presently configured Congressional districts, are reproduced at J.S. App. 38-73.

STATEMENT OF THE CASE

This case concerns the redistricting of the Commonwealth of Virginia's Congressional districts in 1991, following the 1990 decennial census. Under the Virginia Constitution, redistricting is a legislative function performed by the Virginia General Assembly, subject to the amendment and veto power of the Governor of Virginia. Va. Const. Art. II, § 6. The entire State of Virginia is subject to the preclearance requirements of the Voting Rights Act, 42 U.S.C. § 1973(c) (1988), and Virginia must obtain approval from the Department of Justice ("DOJ") of any changes to the electoral process, including the redrawing of Congressional district lines.

The official 1990 census data for Virginia on January 23, 1991 revealed that Virginia's population increased between 1980 and 1990 from 5,346,818 to 6,187,358 (15.72%). The black population grew by about 154,326, from 1,008,668 to 1,162,994, so that blacks constituted 18.8% of Virginia's total population. Although blacks totaled nearly one-fifth of the State's population, twentieth-century Virginia never had elected a black to Congress until the 1991 plan was adopted.

Most of Virginia's population growth occurred in Virginia's "golden crescent," the urban corridor in Eastern Virginia which runs from Northern Virginia south to Richmond and Petersburg, and through the Hampton Roads/Tidewater areas. As a result of the population changes in Virginia, coupled with population losses in other states, the number of Congressional districts increased from ten to eleven. One of the first redistricting issues to arise was the location of the new district. Plan drawing "became mired in a dispute among senior Democrats about where to place the new seat the state gained."

(Joint Exhibits "J.E." 1419.)[1] Northern Virginia legislators wanted the new seat in "the fast growing Washington suburbs," (J.E. 1351), while Hampton Roads legislators sought a Tidewater district. (J.E. 1393, 1402.)

A. Redistricting Preparations.

The General Assembly had established a Joint Reapportionment Committee to plan for redistricting in 1991. *See* Va. Code § 24.1-40.10 (now repealed). The Committee authorized the installation of a sophisticated automated mapping and redistricting system known as Computer Assisted Mapping and Computer Assisted Redistricting system ("CAMCAR"). This system was used during all state House, Senate, and Congressional redistricting in 1991. The system includes a wealth of data showing physical, geographic and waterway features, transportation networks, and population statistics for age and race by census block, precinct, city, and county. Significantly, CAMCAR also includes political data and elections results for state and local elections conducted in Virginia between 1983 and 1989. The elections data are broken down by census block, and can be aggregated to show party performance for any potential election district created in the system.

Following receipt of the 1991 census data, the House and Senate Privileges and Elections ("P&E") Committees held a joint hearing on February 19, 1991, to receive comments on redistricting criteria, and to adopt a resolution detailing the hierarchy of legal "criteria" (required by law) and "policy considerations" (subject to legislative direction) guiding the redistricting process. The criteria listed in that resolution were as follows: (1) equal representation; (2) minority representation; (3) compactness; (4) contiguity; and (5) political fairness. The additional policy considerations were: (1) political subdivisions; (2) communities of interest; (3) precincts; and (4) existing districts and incumbency. *See Jamerson v. Womack*, 244 Va. 506, 511-12, 423 S.E.2d 180, 183 (1992) (rejecting compactness challenge to 1991 state Senate districts).

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[1] Six volume set admitted at trial under stipulation by the parties.

B. Public Hearings.

While the full General Assembly was scheduled to convene for Congressional redistricting on November 19, 1991, the Joint P&E Committee held an early public hearing in Richmond on October 11, 1991, to receive proposals. At the hearing, the American Civil Liberties Union ("ACLU") presented a proposal which created an effective minority Congressional district beginning in Norfolk and following the James River to the City of Richmond, with a total black population of 66.2% and voting age black population ("VAP") of 63.13% (J.E. 138-39.) The ACLU offered the district to demonstrate that "it can be done." (J.E. 1356.) Committee members expressed concern because the proposed district included the Petersburg home of incumbent Congressman Norman Sisisky (an influential member of the House National Security Committee), and placed three major Virginia military/shipbuilding installations in one district (Norfolk Naval Base, Newport News Shipbuilding, and the Portsmouth Naval Shipyard).

Also at this hearing, two Legislative Black Caucus members suggested that Virginia create two minority districts (J.E. 1359). Later, on November 8, 1991, the Joint P&E Committee unveiled its "Working Draft" plan, which established a new, open Congressional district in Northern Virginia, provided for a minority district with a black VAP of 58.56%, and dispersed the major military/shipbuilding installations among separate Congressional districts. This proposal also was criticized because the minority district included the Newport News home of Republican incumbent Congressman Herb Bateman. The Legislative Director of the Newport News Shipbuilding Company argued that Bateman's seat should be preserved, because his assignment to the House Armed Services Committee had "helped the Yard with contracts to build submarines and aircraft carriers." (J.E. 1345.) Civil rights leaders also attacked the Working Draft Plan because it created only one minority district when "two majority black districts or one majority and another with 43 percent" were feasible. (J.E. 1402.)

Legislators and public interest groups proposed some ten additional redistricting plans after the Working Draft was

released. One Black Caucus member offered a *two* minority districts plan (with 55.68% and 52.09% total black population) (J.E. 1408). The Senate Majority Leader offered a plan which created a 60.35% Richmond to Norfolk minority district with no incumbent, which appeared very regular in shape (and which scored well on perimeter and dispersion compactness measures utilized by experts in this field). (J.S. App. 80.) That plan was criticized, however, as hurting the re-election chances of two prominent Democratic Congressmen (J.E. 1403). Significantly, it was substantially incorporated by Republican legislators into plans they offered.

C. Floor Debates.

At the time of the 1991 Congressional redistricting, Democrats held a majority in both the House of Delegates and Virginia Senate. The debate was highly partisan. The Joint P&E Committee offered for adoption a modified Working Draft Plan entitled "Senate Committee Substitute for S.B. 2003." The proposal placed Armed Services Committee member Congressman Bateman in his own First District, but it paired two Republican Congressmen in the Seventh District (J.E. 1407.) The proposal preserved the new open district in Northern Virginia. The plan established a single majority/minority district with a black VAP of 57.87%, thereby rejecting demands for *two* minority districts, and addressing concerns that blacks would be "packed" into a district. (J.E. 1405.)

The debates in the House and Senate proceeded similarly. In each case, the Committee substitute was offered for adoption, and Republican members offered their own plan as a substitute. Democratic Senator Joseph Gartlan's floor speech opposing the Republican substitute is illustrative of the debate.

Gartlan blasted the Republican proposal over "its denial to Northern Virginia of an open seat." (J.E. 1012.) He criticized the proposed minority district in the Republican plan as "a form of packing" which "totally eliminates" a neighboring influence district. And he decried the "hypocrisy" of alleging "partisanship in the drawing of the Committee substitute." (J.E. 1013.)

Gartlan continued that the Republican plan, by taking 50,000 votes from Portsmouth for a minority district, would "politically emasculate" Fourth District (Democratic) Congressman Sisisky, and deprive the state of "his influence on the House Armed Services Committee." (J.E. 1014-15.) Because the Fourth District was pushed farther west into the Fifth District, "this is the beginning of the end of . . . (Democratic) Congressman [L.F. Payne's] career." (J.E. 1015.) And further, because the Fifth District would force the Sixth District to run north up to Republican-leaning Frederick County and the City of Winchester, "what do you think (Democratic Sixth District) Congressman Olin is going to do." (J.E. 1016.)

Gartlan summarized his remarks:

> So it would seem to me, ladies and gentlemen of the Senate, that we recognize this measure for what it is, that we stay with a very carefully constructed Committee Substitute, that certainly *has its partisan objective of maintaining the current Democratic majority in the Congress of the United States* in the Virginia Delegation, *giving an open seat to the new black majority Third District*, as represented in this plan, and *giving a new open seat to Northern Virginia*. (Emphasis supplied.)

(J.E. 1016-17.) Senator Johnny Joannou of Portsmouth also spoke against the Republican proposal, stating its effect would be "devastating" because "this plan puts the Norfolk Naval Shipyard, the Newport News Shipyard . . . and the Naval base in the same district" (J.E. 1024). The Republican plan was put to a vote and was defeated 13-25. (J.E. 1026.) Eventually, the Committee Substitute was adopted, with minor technical amendments, by a vote of 24-14. (J.E. 1061.) The debate in the House of Delegates proceeded similarly.[2]

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[2] Republican Delegate John Watkins also attempted a parliamentary maneuver in the House of Delegates to have his version of the Republican plan considered. He argued his plan "maintains the integrity of communities of interest," and "is less partisan than any plan I have seen."

D. Governor's Amendments.

Governor L. Douglas Wilder's amendments were widely perceived as improving the plan. He reduced the jurisdictional splits in Richmond City and Henrico County from three to two. (J.E. 1468.) He also reduced the jurisdictional splits from three to two in Newport News and made "a more compact Seventh Congressional District" (J.E. 1298.) His changes enhanced the contiguity of the plan in several respects, and reduced population deviations. (*See* Summary of Adjustments, attached at J.S. App. 74-79.)

While the Governor's revisions resulted in an increase in the black population of the Third District (61.48% to 63.98% pop.; 58.5% to 61.17% VAP), he specifically declined requests from the ACLU and NAACP to increase the total black population in the Third District to 66%. Wilder said he refused "to avoid further diluting black voter strength in districts that abut the majority black district." (J.E. 1473.) "[S]ome Republicans grudgingly acknowledged that the Richmond area districts look more compact and show greater attention to linking communities with similar social and economic interests in the same district." (J.E. 1468.) The Governor's revised plan passed the House and Senate on December 9, 1991. The Justice Department approved the plan on February 18, 1992. (J.E. 7, 1690.)

(J.E. 1082.) Democratic Delegate Richard C. Cranwell, among others, spoke against the proposal. Cranwell stated:

> . . . I've heard from Congressman Payne, Congressman Olin, Congressman Boucher, Congressman Sisisky, and they all tell me that the gentleman's plan is nothing more than an attempt to gerrymander them out of the United States Congress. I like all those gentlemen so I don't believe I want to help the gentleman with his plan of evicting those gentlemen from United States Congress.

(J.E. 1091.) The Motion to adopt the Watkins substitute was defeated by a vote of 38-52. (J.E. 1094.)

E. Technical Amendments.

The General Assembly adopted "technical amendments" to the redistricting plan in its 1992 and 1993 sessions. These were not substantive, but were intended to "reduce the number of split precincts for localities and to conform the lines to new local precincts and new local and state legislative election district lines." (J.E. 1691.) "Most changes were initiated by local requests." (J.E. 1715.) Since these changes also were subject to DOJ pre-clearance under § 5 of the Voting Rights Act, local elections officials were notified that "no change will reduce the black percentage of total or voting age population" in the Third Congressional District. (J.E. 1637.) An incidental effect of the 1992 and 1993 changes was to raise the VAP in the Third District from 61.17% to 61.60%. (J.E. 1648, 1716.)

F. The Third District Court Proceedings.

Suit was filed against state officials on November 21, 1995, and a three-judge panel was convened pursuant to 28 U.S.C. § 2284. Donald Moon and Robert Smith are plaintiffs, but did not testify at trial. The suit was backed and funded by a Texas-based organization known as "Campaign for a Color-Blind America." Plaintiffs' chief expert witness, Ronald E. Weber, is on the Board of Directors of this organization, and one of plaintiffs' attorneys in the district court, Steve Katsurinis, serves as the Campaign's counsel.

On January 17, 1996, the district court granted the application of nine residents of the Third Congressional District to intervene as parties defendant. The intervenors, who also have appealed separately the district court's decision, are represented by counsel from the ACLU and the NAACP Legal Defense Fund.

The suit was tried over two full days, September 11-12, 1996, in Roanoke, Virginia. On February 7, 1997, the district court issued its Memorandum Opinion and Order declaring that the Third Congressional District is violative of the Equal Protection Clause of the Fourteenth Amendment, and enjoining any further elections. This appeal followed.

THE QUESTIONS ARE SUBSTANTIAL

This case is another in the line of "racial gerrymandering" cases commencing with *Shaw v. Reno*, 509 U.S. 630 (1993) ("*Shaw I*"), and it represents the most striking example of federal court intrusion into traditional state prerogatives to date. The court below wholly failed to recognize that when the Virginia General Assembly created the 1991 Congressional districting plan, it specifically set out to accomplish several major policy objectives, including preserving the partisan advantage for the Democratic majority; creating a new, open district in Northern Virginia; forming an effective minority district; protecting its senior, incumbent Congressmen; and maintaining maximum representation for vital military and economic interests. All of these policy objectives were considered within the legal framework of one-man/one-vote, and the State constitutional requirement of contiguous and compact districts. Every one of these objectives were achieved, yet not one of these considerations predominated over the other. Instead of giving deference to these state policy choices, the court below imposed its subjective districting preferences and principles in reviewing Virginia's Congressional districting plan. It disregarded Virginia's established and well-defined hierarchy of districting "criteria" and "policy considerations," in reaching the conclusion that Virginia's Third Congressional District was subject to strict scrutiny. If this substitution of "federal" districting principles is permitted to stand, the end result will be a legal regime which transfers the reapportionment process to the federal judiciary, contrary to the central principle that state governments are given primary responsibility for redistricting. *See Bush v. Vera*, 116 S.Ct. 1941, 1960-61 (1996); *Miller v. Johnson*, 115 S.Ct. 2475, 2488 (1995); *Voinovich v. Quilter*, 507 U.S. 146, 156 (1993).

This case is distinguishable from every racial gerrymandering case which has been decided by this Court. Unlike North Carolina's 12th District, Virginia's Third District is not "so bizarre" as to be inexplicable other than on the basis of race. *Shaw I*, 509 U.S. at 658. (*See* comparison maps at J.S.

App. 81-83.) Also unlike concerns in North Carolina, Virginia's Third District, a § 2 "remedy" district, was placed in the area of the alleged violations, and in an area of the state having a compact minority population. *Shaw v. Hunt*, 116 S.Ct. 1894, 1906 (1996) ("*Shaw II*").

In *Miller v. Johnson*, the problem was not district shape. 115 S.Ct. at 2489.[3] Instead, the Court found an intent to discriminate because it was obvious, "both from the Justice Department's objection letters and the three preclearance rounds in general, 'that [the Justice Department] would accept nothing less than abject surrender to its maximization agenda'." *Id.* at 2489. That finding is inapplicable in this case. As the district court below specifically stated, "[t]he record reflects *no* indication that the Department of Justice advocated a 'maximization' policy for Congressional districts in Virginia." *Moon v. Meadows*, (J.S. App. 20.) (emphasis supplied). Georgia did not claim any compelling interest under § 2 of the Voting Rights Act.

The Texas case was a "mixed-motive" case. *Bush*, 116 S.Ct. at 1954. This Court acknowledged that one of Texas' goals in creating districts which were "especially irregular in shape" was "incumbency protection (including protection of 'functional incumbents,' i.e., sitting members of the Texas legislature who had declared an intention to run for open congressional seats)." *Id.* at 1952; 1954. The Court concluded, however, that this political manipulation was accomplished in large part by the use of *race as a proxy* for political characteristics, which is subject to strict scrutiny. *Id.* at 1956-58. The present case is likewise a mixed-motive case. The court below noted that it "recognizes that in redistricting the legislature did not ignore political partisanship, protection of incumbent office holders, and the desire to keep in separate districts, where legally appropriate, military installations." (J.S. App. 17.) There is *no* evidence, however, that race was used by the

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[3] Of all the Congressional districts reviewed by this Court, Virginia's Third District most resembles Georgia CD 11 in appearance. *See* J.S. App. 81.

legislature as a "proxy" for political characteristics, or that political concerns were a pretext for race. In fact, it is undisputed that the CAMCAR system contained actual election returns, disaggregated to the census block level, which predicted the political performance of any legislative district created on the system. (J.E. 2941-42; Tr. 229-30.)

In Texas, this Court found all three challenged districts far too bizarre to be narrowly tailored to meet any compelling interest of the State. *Bush*, 116 at 1961. Again, this finding simply does not translate to the Virginia Third District.

In sum, Virginia's Third Congressional District does not exhibit the extreme characteristics which led this Court to invalidate the minority districts in North Carolina, Georgia, and Texas. Instead, the district court reached its result through erroneous application of the legal principles governing these cases, and by substituting its districting priorities for those established by the Virginia General Assembly.

The district court's inattention to the applicable law and the evidence is perhaps most glaring in its finding, contrary to the uncontroverted evidence in this case, that Virginia has no compelling state interest in avoiding liability under § 2 of the Voting Rights Act which could justify the intentional creation of an effective black Congressional district. The erroneous conclusion in the face of the overwhelming evidence effectively traps Virginia between the "competing hazards of liability," because if Virginia does not create an effective minority Congressional district, either as a result of the district court's opinion below or in the 2000 redistricting, the State will almost certainly be sued. *See Bush*, 116 S.Ct. at 1960, *quoting Wygant v. Jackson Bd. Of Ed.*, 476 U.S. 267, 291 (1986) (O'Connor, J., concurring in part and concurring in judgment). Virginia can take little comfort in standing behind the district court's conclusions on this issue, because they are utterly unsupported by the law and the evidence.

Virginia does not lightly assert that there is strong evidence suggesting that unlawful dilution of the minority vote is occurring in the area of the Third District even today, despite the positive progress Virginia has made in the area of race relations. The district court's conclusion, however, is simply

inexplicable in the face of the undisputed evidence on this record. If the evidence in Virginia would be insufficient to cause the State concern about potential liability under § 2 of the Voting Rights Act, it is difficult to conceive what else would be required before a state might have a compelling interest to pro-actively create a race-conscious district.

Virginia did not subordinate traditional districting practices in order to create a § 2 remedial district. Virginia's acknowledgment of its obligation to create an effective minority district is not enough, by itself, to trigger strict scrutiny of the district. Moreover, because Virginia had such a compelling state interest, the State's districting choices were entitled to a heightened deference, which the district court failed to afford.

1. The district court erred by substituting its judgment for that of the Virginia legislature and rejecting the State's adopted hierarchy of districting principles, because the record establishes that Virginia's own, well-defined districting principles were not substantially disregarded by the legislature, and race was not given quantitatively greater consideration in drawing the district.

A. The District Court Applied Its Own Subjective Districting Preferences And Ignored Virginia Districting Policy.

The district court pointed to what it considered the "bizarre shape" of the Third Congressional District and concluded that "traditional principles" were ignored in the creation of the plan. The question of when a district may be considered sufficiently "bizarre" as to trigger strict scrutiny is critical. If an effective minority district may be deemed "bizarre" whenever it departs from some subjective ideal of compactness, state legislative discretion and political judgment is ignored in favor of the preferences of individual federal judges. That is precisely what occurred in this case.

Virginia's hierarchy of districting criteria was well-established at the time of the Congressional redistricting in November 1991. State legislative districts in the House of Delegates

and Virginia Senate had been enacted and approved by the DOJ under standards adopted by the P&E Committees. Districting principles were prioritized as either "criteria" (required by law), or "policy considerations" (committed to legislative discretion). The district court erred in finding the Third District to be bizarre, that is "non-compact," because the district court used an erroneous standard of compactness.

In Virginia, "compactness" refers solely to the geography, and not to the content, of the district. *Jamerson v. Womack*, 244 Va. 506, 423 S.E.2d 180 (1992); *Wilkins v. Davis*, 205 Va. 803, 139 S.E.2d 849 (1965); *Brown v. Saunders*, 159 Va. 28, 166 S.E. 105 (1932). Whether the district divides political subdivisions – the test adopted by the district court – is *not* an element of compactness under Virginia law. Rather, it is a "policy consideration," subject to far broader legislative discretion. And, it is a consideration which has much diminished in importance since the advent of one man/one vote and the elimination of multi-member districts. *See e.g.*, Morris, *Redistricting and Reapportionment in Virginia*, ("one of Virginia's traditional criteria for redistricting – the maintenance of city and county lines – has been rejected along with multi-member districts"). (J.E. 2733.)

The Third District is reasonably compact under traditional Virginia standards. Indeed, the Third District is more compact, using the mathematical dispersion scores employed by experts on both sides, than the least compact Congressional districts from the 1980's plan. *See* Neimi & Pildes, "Expressive Harms, 'Bizarre Districts,' and Voting Rights: Evaluating Election-District Appearances after *Shaw v. Reno*," 92 Mich. L. Rev. 484, 573 (1993) (J.E. 2665-67). Comparing Virginia's perimeter and dispersion scores for the 1980's and 1990's Congressional districts against districts nationwide, Virginia falls in the middle in the 1980's, and is only slightly below those numbers in the 1990's. *Id.* The Virginia pattern is consistent with a nationwide trend towards somewhat less compact districts in the 1990's. The Third District is not significantly less compact or regular than other Congressional districts in Virginia. (Defendant's Exhibits "D.E." 1, pp. 5-6, 11.) For example, the Eleventh Congressional District, which is 75-80% white, was

created to be an open district in Northern Virginia favorable to a Democratic candidate. This district has been described as having a "shape that vaguely recalls the human digestive tract."[4] The Third District is not nearly as misshapen as the Texas Districts 18, 29 and 30, which were invalidated, or North Carolina District 12 which was invalidated. Mathematical compactness scores confirm this "eyeball" test; these districts appear on a list of the twenty-eight "least compact" Congressional districts in the nation. Virginia's Third District does not. (*See* J.S. App. 81-83; J.E. 2659.)

The district court failed to give sufficient deference to Virginia's policy choice of protecting political and economic interests of vital importance to the Commonwealth. Virginia openly and unapologetically sought to preserve the incumbencies of the senior members of Virginia's Congressional delegation, and particularly those senior members serving on subcommittees related to the State's military interests.[5] In *Bush*, this Court expressly acknowledged that this type of protectionism is a "legitimate state goal" in redistricting. 116 S.Ct. at 1954, 1956. Virginia depends heavily on a military economy, particularly in the Central and Tidewater regions of the State. There was widespread consensus among Virginia legislators that the State's major military bases and naval shipyards should be spread out among at least four different Congressional districts in order to maximize influence in Congress.

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[4] Congressional Quarterly's Politics in America 1994; The 103rd Congress (P. Duncan, ed., 1994), p. 1602.

[5] These incumbents included 1st District Rep. Herb Bateman (R-Newport News), who was Chairman of the Military Readiness Subcommittee, and a member of the Military Research and Development Subcommittee, of the House National Security Committee; 2nd District Rep. Owen Pickett (D-Va. Beach), a member of the Military Personnel, and Military Readiness Subcommittees of the House National Security Committee; and 4th District Rep. Norman Sisisky (D-Petersburg), a member of the Military Procurement, and Military Readiness Subcommittees of the House National Security Committee. Barone & Ujifusa, *The Almanac of American Politics* 1996, at 1373, 1375, 1379.

The district court ignored these vital state policy choices, and instead seized on evidence of an increase in the number of split cities and counties in the 1991 plan to establish racial intent. Plaintiffs' expert conceded that all three of the county splits in the Third District were for non-racial reasons (Plaintiffs' Exhibits "P.E." 22, p. 26), and the evidence established that four of the eight city splits were necessary to carve out the incumbents living in Richmond, Petersburg, and Newport News, and to allocate the two naval shipyards located in the City of Portsmouth. (D.E. 21; 33E; Tr. 345-46; 355-60; 364-65.) Out of eleven locality splits in the Third District, seven clearly were explained on grounds *other* than race. Virginia's elected officials determined that protecting its senior Congressional incumbents and its military clout in Congress outweighed the competing "policy consideration" of preserving political subdivisions. By second guessing this legislative judgment and imposing its own districting preferences, the district court's decision thwarts Virginia's legitimate redistricting objectives.

B. Legislative Intent Alone Does Not Trigger Strict Scrutiny.

Contrary to the repeated suggestions of the district court, strict scrutiny is not triggered merely by showing that the state *intended* to create a majority-minority district, or that the districting was performed "with consciousness of race." *Bush*, 116 S.Ct. at 1951. As Justice O'Connor noted in her separate opinion in *Bush*, a majority of the Justices agree that:

> States may intentionally create majority-minority districts, and may otherwise take race into consideration, without coming under strict scrutiny. Only if traditional districting criteria are neglected, *and* that neglect is predominantly due to the misuse of race, does strict scrutiny apply.

Bush, 116 S.Ct. at 1969 (O'Connor, J., concurring) (citations omitted) (emphasis in original).

The district court relied on three pieces of evidence to "demonstrate that the Commonwealth intentionally drew the

Third District's boundary lines to include black populations." (J.S. App. 11.) None of these pieces of evidence, however, considered individually or collectively, supports a conclusion that race *predominated* in the legislative deliberations.

First, the district court points to the Commonwealth's § 5 preclearance submission to the DOJ, and observes that "[s]trikingly, the Attorney General omitted any reference that the traditional race neutral criteria . . . were considered in the process." (J.S. App. 11.) However, as Justice Stevens observed in his dissenting opinion in *Bush*, it is *ironic* and *unfair* to consider a § 5 submission as evidence, particularly insofar as what the submission does *not* contain. A § 5 submission is an *advocacy* document, which must be submitted as mandated by federal regulations. *See* 28 C.F.R. §§ 51.20-28 (prescribing form of submission with "required contents"). A § 5 submission expert testified at trial that such pre-clearance requests do not routinely include non-racial criteria. (Tr. 395-96.) They reflect the requirements of federal law – not legislative intent.

The district court also cited the "Guidelines for Technical Adjustments" to the districting plan issued by the Division of Legislative Services. These guidelines were issued in 1992, *after* DOJ adopted and approved this districting plan. The guidelines, which, among other things, prohibited a reduction in the black percentage of total or voting age population in minority districts, were intended to allow *local* government officials to submit changes which would conform Congressional district lines to their local districts. As the undisputed testimony established, the guidelines were intended to avoid any *retrogressive* effect in local district corrections. Again, this arose from a requirement of the federal law – not a reflection of legislative intent. *See Beer v. United States*, 425 U.S. 130 (1976).

Finally, the district court referred to a "Summary of Adjustments" accompanying Governor Wilder's proposed amendments to the redistricting plan as adopted by the General Assembly. Although this plan contained five sections (outlining several proposed changes), the district court referred only to one section (Section "C") as proof that "race predominated

in the creation of the final plan." (J.S. App. 12.) A review of the *full* summary, however, reveals that other districting principles were not "substantially disregarded." *See* J.S. App. at 74-79. Indeed, while the Governor's changes slightly increased the black population in the Third District, they also reduced the number of locality splits in the Richmond area; reduced the number of locality splits in the City of Newport News; enhanced the contiguity of the plan; and further reduced population deviations in Districts Eight and Eleven. The Governor's proposed amendments, all of which were adopted, demonstrate that the consideration of race was not "quantitatively greater" than other districting principles.

In sum, the district court's conclusion that the evidence in this case was sufficient to trigger the strict scrutiny requirement, is clearly erroneous as a matter of law. As this Court has stated:

> [T]he sensitive nature of redistricting and the presumption of good faith that must be accorded legislative enactments requires courts to exercise extraordinary caution in adjudicating claims that a state has drawn district lines on the basis of race.

Miller, 115 S.Ct. at 2488. The district court failed to exercise such extraordinary caution in its analysis of the evidence in this case, and this Court should grant plenary review.

2. The district court erred in finding Virginia has no compelling state interest to draw an effective minority district in the area of the Third Congressional District, where African-Americans reside in numbers sufficient to constitute a majority in a Congressional district, and in most cases, African-Americans who are candidates of choice of the African-American voters cannot be elected due to white bloc voting, in violation of § 2 of the Voting Rights Act.

A. Standard Of Review.

The district court held the State to an improper standard of proof. The district court appears to have analyzed the evidence

to determine whether the State could have defended a § 2 lawsuit. The proper standard, however, was whether the state had a strong basis in evidence in 1991 for believing that the creation of an effective minority district was reasonably necessary to comply with § 2 of the Voting Rights Act. If Virginia had a reasonable basis in 1991 for believing that the three preconditions for § 2 liability outlined by this Court in *Thornburg v. Gingles*, 478 U.S. 30 (1986), were present in the area of the Third District, the State has met its burden of proving a compelling interest to draw an effective majority black district. *Shaw II*, 116 S.Ct. at 1905-07; *Bush*, 116 S.Ct. at 1969-70.[6]

There is no serious dispute that Virginia proved the existence of the first two prongs of the *Gingles* analysis. The district court below suggested, but did not find, that the State could not prove that the African-American population was sufficiently compact for purposes of establishing the first *Gingles* precondition for § 2 liability. The district court made this suggestion simply because, in the district court's view, the Third District itself was not reasonably compact. (J.S. App. 22.) The district court was plainly wrong because, as argued above, the district court applied an improper standard of compactness. Regardless, the geographic compactness analysis for *Gingles* purposes properly focuses on the compactness of the minority population, not on the compactness of the contested district. *Bush*, 116 S.Ct. at 1971 (Kennedy, J., concurring); *see also id.* at 1970 (O'Connor, J., concurring); *see Growe v. Emison*, 507 U.S. 25, 40 (1993). The demographic maps firmly establish that African-Americans in Virginia reside in such a pattern that they could constitute a majority in a Congressional

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[6] Although typically conclusions concerning unlawful vote dilution under § 2 of the Voting Rights Act are reviewed for plain error, consistent with this Court's ruling in *Gingles*, 478 U.S. at 77-79, misapprehension of the proper analysis to be applied to the evidence is properly viewed as a pure legal error which should be reviewed *de novo*. *See Rollins v. Fort Bend Independent School Dist.*, 89 F.3d 1205 (5th Cir. 1996).

district in the area of and surrounding the present Third District.[7]

There is *no* dispute that the black vote in Virginia generally, and specifically in and around the Third District, is cohesive to an extraordinary degree. (Tr. 468.)

B. In 1991, A Reasonable Legislator Would Have Concluded That Voting In And Around The Third District Is Racially Polarized, Such That White Voters Usually Are Able To Prevent Black Voters From Electing Minority Candidates Of Choice.

This is not a case where the State is attempting to justify the intentional creation of a majority-minority district with evidence accumulated after the enactment of the plan. The record shows that counsel specifically advised the Virginia General Assembly during its deliberations about potential § 2 vote dilution liability. (J.E. 91-92; 1502-03.) By the time the

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[7] The record below additionally shows numerous alternative districting plans which were presented to the General Assembly which created reasonably compact Congressional districts having a majority black voting age population in the approximate area of the Third District. (*E.g.*, D.E. 22A, 22E, 22H, 22L); *See* J.S. App. 80.

The plaintiffs did not seriously dispute this issue. The plaintiffs properly concede that a Congressional district does not lack geographic compactness for purposes of the *Gingles* analysis simply because cities might be divided by the district lines. *See Houston v. Lafayette County*, 56 F.3d 606, 611 (5th Cir. 1995); *Cane v. Worcester County, Md.*, 35 F.3d 921 (4th Cir. 1994); *Clark v. Calhoun County, Miss.*, 21 F.3d 92, 96 (5th Cir. 1994). (Tr. 136-39.) Plaintiffs instead tried to suggest that such a district would lack "geographic compactness" in Virginia because Richmond and Tidewater are, in their view, "disparate" communities. Plaintiffs conducted no proper analysis to support such a suggestion, and they virtually ignored compelling evidence of the communities of interests shared by these regions. (*E.g.*, D.E. 37-40.) They have further badly confused Virginia's traditional geographic compactness requirement with the separate and distinct requirement that a district, as a matter of policy, should reflect a community of interest. *Jamerson v. Womack*, 244 Va. 506, 423 S.E.2d 180 (1992).

State drew its plan following the 1990 census, voting rights lawsuits against numerous local governments at both the city and county level throughout Virginia – including a number of jurisdictions within the area that eventually became the Third Congressional District – had resulted in findings of § 2 liability, either through judgment or consent decrees. These lawsuits were widely publicized throughout the Commonwealth. It defies common sense to believe that such findings of liability would have been or should have been ignored by the General Assembly. *See Bush*, 116 S.Ct. at 1969-70 (O'Connor, J., concurring). The Virginia General Assembly had data such as election returns and voter registration numbers available to evaluate more precisely the potential for § 2 liability. The record, in fact, reflects that members of the Virginia Black Caucus examined these data and advised the General Assembly that, in their view, a majority black district would be required to ensure that the minority vote would not be unlawfully diluted. (J.E. 654-63.)

The district court properly recognized that the contests in which African-American candidates competed were the most probative on the issue of potential vote dilution in violation of § 2 of the Voting Rights Act. *Gingles*, 478 U.S. at 52-53, 58-59, 80 (1986); *Collins v. City of Norfolk*, 883 F.2d 1232 (4th Cir. 1989), *cert. denied*, 498 U.S. 938 (1990). The district court, however, conducted an overly-simplistic analysis of this issue, by failing to focus on the contests in which African-American candidates competed **as candidates of choice** of the minority population. The district court failed to distinguish the successes of African-American candidates in **black majority districts**, who did not need the support of the white voting bloc, from the far less frequent successes of African-American candidates in white majority districts. The district court additionally failed even to consider the contests in which African-

American candidates of choice were defeated by white bloc voting in black majority districts.[8]

The evidence is undisputed that in 1991, in the state legislative contests which directly preceded the Congressional redistricting process, black candidates of choice were defeated by white candidates in the Democratic primaries held in three newly-created black majority districts. In fact, a black candidate of choice was defeated by a white Republican in a solid black majority district in the 1991 general elections. The racial polarization of this contest was extreme. In three other contests in which a black candidate competed in white majority state legislative districts, one in 1987 and two in 1989, the black candidate of choice was defeated by white bloc voting. Even in the contests in which black candidates of choice were successful in black majority districts, voting was racially polarized most of the time. (D.E. 1, p. 23; D.E. 4; P.E. 22, pp. 102-104). Perhaps most significantly, when African-American Congressman Robert Scott ran as a Democratic challenger in the First Congressional District in 1986, then a majority white district with approximately one-third black VAP, *he was able to attract less than eight percent of the white vote.* Although nearly one hundred percent of the black voters supported him, he was defeated.[9]

These contests were fresh in the minds of the Virginia legislators as they were drawing the new Congressional districts, yet they are not mentioned or even acknowledged by the district court. Instead, the district court improperly focused on the only three successes of two black candidates of choice in statewide or state legislative majority white districts between 1985-1991. The district court focused on the elections of former Governor Wilder and then state Senator (now Congressman) Scott to the exclusion of the other undisputed evidence in

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[8] The district court's lack of proper focus is apparent from the numerous comments made at trial that the § 2 issue in the case was simply whether black candidates could get elected, an error which the Defendant-Intervenors tried in vain to correct. (Tr. 179, 181-82, 185, 189.)

[9] *See* Tables 1 and 2, J.S. App. 84-85.

this case, and without even considering whether any of these successes could be attributed to "special circumstances." *See Gingles*, 478 U.S. at 74-77.

Both Scott and Wilder began their political careers in Virginia relying nearly exclusively upon the black vote, with virtually no support of the white voters. Once elected, they were both ultimately able to appeal to a moderate, bi-racial political base. Today, Scott and Wilder are well known in Virginia politics for their ability to build bi-racial coalitions, yet they both have experienced some difficulty in their political careers in appealing to white voters. Congressman Scott was successful in his 1987 campaign for state Senate District 2, a white majority district with an approximately 36% black VAP. He was successful, however, because black voters turned out in very high numbers to support him, and he enjoyed the support of virtually all of the black voters. The white vote "crossed over" to support him only at a rate of approximately 26%, a number that is relatively high for black candidates in Virginia, but it likely would not be enough to elect him without extraordinarily high black turnout in a district with a substantial black population. (D.E. 1, p. 19; Tr. 436, 439-40.) Congressman Scott, as is noted above, was unsuccessful in 1986 when he ran for Congress in the First District, which had a substantial black population of approximately 30%. In that contest, high black turnout was not enough, because white crossover support was a very low 8%.

Wilder's election to the office of Lieutenant Governor was the tightest of the three statewide races in 1985, and while Wilder garnered some of the white vote, most whites voted for his opponent, and a higher proportion of whites voted for his white Democratic running mates. (P.E. 22, pp. 76-77.) Voting in this contest was more racially polarized in the jurisdictions which make up the Third District than it was statewide. (D.E. 1, p. 20.) Respected Virginia political commentator, Dr. Larry Sabato, explains Wilder's 1985 success, in part, by luck and skill. He explains that Wilder benefited measurably from running mate Gerald Baliles' margin of victory in the Governor's race, and from then Governor Robb's popularity at the time. Dr. Sabato also explains Wilder's 1985 success, in large part,

by the weakness of his opponent. (J.E. 2065-66, 2068-69.) As Dr. Sabato noted, "[f]or all the strengths of Wilder's campaign, he arguably would not have won, considering his liabilities, if he had faced an able, mainstream opponent who could have run a strong campaign." (J.E. 2069.)

Wilder was the first black Governor elected to office in the history of this country, an historic achievement in Virginia. Dr. Sabato's detailed analyses of this 1989 victory, however, demonstrates how and why this victory cannot be read to signal that Virginia's voting patterns suddenly have become integrated. This contest was the closest Governor's race in Virginia's modern history. Although Wilder obviously could not have won without the support of white voters, white voters supported Wilder's white Democratic running mates at a higher percentage. Black support for Wilder was "monolithic," and black voter turnout was significantly higher than white turnout. In fact, black voters turned out at historic and virtually unprecedented levels. (J.E. 2243.)[10] Voting was racially polarized, and it was more polarized in the jurisdictions that make up the Third District than it was elsewhere in the state. (D.E. 1, p. 20.) Dr. Sabato notes that "rarely have conditions been so favorable for a minority candidate," and "Wilder's race probably cost him tens of thousands of votes on election day." (J.E. 2252, 2259.) As Dr. Sabato explains:

> . . . Wilder's slim plurality and the evidence of racial voting – which produced the most unique electoral patterns in the state's modern history – should give Virginia boosters pause. . . .
>
> Not every lesson drawn from Virginia's 1989 contest could cheer black candidates. . . . The trek to the winner's circle is still arduous for a minority

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[10] Plaintiffs' and defendant's experts agree that in 1987 and in 1989, candidates Scott and Wilder benefited measurably from black voter turnout levels which have not been seen since in Virginia. (P.E. 22, pp. 50-66; D.E. 1, pp. 19, 27; Tr. 436-40.) Dr. Sabato likewise confirms that in the 1985 Lt. Governor's contest, black voter turnout exceeded white turnout. (J.E. 2046.)

> contender. After all, Wilder was beautifully positioned for the battle. He was unopposed for the nomination, enjoyed the support of a united party reconciled to his run, was exceptionally well-financed, and reigned as heir apparent to two popular administrations, won the preponderance of editorial endorsements, ran a shrewd campaign, and was handed the 'magic bullet' of abortion – and with all this he barely won.

(J.E. 2259.)

The district court failed to consider the other compelling, undisputed evidence which supported the legislature's reasonable belief that a black majority district was necessary to comply with § 2. For example, in 69% of contests held within the Third District localities between 1985-1996, white voting blocs defeated black candidates of choice in single member, majority white districts. (D.E. 1, pp. 18-23; D.E. 4.) Between 1979-1985, white bloc voting probably was responsible for the defeat of black candidates of choice in most cases, in white and black majority districts, with rare exception. (D.E. 1, p. 25; J.E. 1747-60, 1829-39, 1872-82, 1968-81.)[11] This evidence was absolutely unchallenged by plaintiffs below, indeed, much of it was admitted by plaintiffs below, and it was virtually ignored by the district court, without any explanation.

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[11] The undisputed evidence in this case further established that between 1991-1996, a general pattern of vote dilution continued, such that black candidates of choice could only get elected in black majority districts, and even then, voting is racially polarized in most of the contested elections (D.E. 1, pp. 18-23; D.E. 4; P.E. 22, p. 104.)

C. The District Court Offered No Rational Basis For The Conclusion That The Virginia Legislature Did Not Have A Strong Basis In Evidence For Believing An Effective Black District Was Reasonably Required To Address § 2 Liability.

It is difficult to understand how the district court could have reached any conclusion *but* that the Virginia General Assembly had a strong basis for believing an effective black Congressional district was reasonably required to address § 2 liability concerns. The district court cites the report of plaintiffs' expert, Dr. Weber, at pages 102-04 of his report, and concludes, incredibly, "[t]he most persuasive expert opinions in this record make clear that white bloc voting does not prevent blacks from electing their candidates of choice." (J.S. App. 22.) Weber's report, and particularly the pages cited by the district court, in no way supports this conclusion; in fact, the cited evidence leads inevitably to the opposite conclusion when the appropriate analysis is applied. The district court's findings are plainly erroneous.

Weber's evidence demonstrates that in the three elections in which African-American candidates of choice competed in majority white districts, they were successful in only one district, and white bloc voting was responsible for the three defeats.[12] In sixteen contests in which African-American candidates of choice competed successfully in majority black districts, voting was racially polarized in twelve of these contests, but because African-Americans comprised a voting

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[12] Weber omits from Table 21 two contests in which black candidates competed in contested elections, (1985 House 92 and 1987 House 90, both majority black districts), and he includes two contests in which Virginia is unable to confirm that a black candidate competed (1985 House 74, 1989 House 20, both majority white districts). It is notable that Dr. Sabato's *Virginia Votes* do not confirm these latter two candidates as African-American, but regardless, Weber acknowledges that these two candidates were not candidates of choice. In Table 22, Weber omits three contests in which black candidates competed (1993 House 77, 1993 House 80, and 1995 House 77, all majority black districts).

majority in the district, the white bloc voting did not defeat the black candidate of choice. In the remaining majority black district contest in which a black candidate of choice competed, the polarized voting was so severe that white bloc voting was able to prevent the election of the black candidate of choice. In the remaining contests, African-Americans were not the candidates of choice of the minority voters. Thus, their defeats are largely irrelevant to the question of vote dilution. The evidence cited by the district court points to only one possible conclusion: voting patterns in and around the Third Congressional District are racially polarized such that white voters constituting a voting majority usually are able to prevent black voters from electing black candidates of choice. Black candidates of choice usually must compete in a black majority district to be successful, and sometimes, by plaintiffs' own evidence, even that is not enough to overcome white bloc voting.

The complete misapprehension by the district court of the law and of the evidence is apparent in the inexplicable reference to the fact that of the current members of the Virginia House of Delegates, 91 are caucasian and 9 are black. (J.S. App. 22.) (The district court is apparently referring to the makeup of the House of Delegates following the November 1995 elections.) All of these black Delegates were elected from majority black districts. No black Delegates were elected from majority white districts.[13] Without analyzing the contests, it is impossible to infer that white support was responsible to any degree for the success of these black candidates. The expert analysis conducted by both sides confirms that just the opposite is true. Voting was racially polarized in five of the six contested elections in which black candidates of choice competed in majority black state House and Senate districts in 1995. (D.E. 4; P.E. 22, "Table 22.")[14]

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[13] White Delegates were elected from the remaining three black majority districts.

[14] As further example of the complete lack of logic in the opinion below, the district court improperly characterized a DOJ statement in Virginia that it would not require a black district be drawn simply because

Finally, the district court failed to consider the dismal average white voter "crossover" vote for minority candidates of choice in Virginia. On average, white voters will support black candidates of choice in majority white districts at a rate of 16.78%.[15] This rate is insufficient to elect black candidates of choice, unless black voter turnout is unusually high, and/or the black VAP in the district is, at the very least, substantial.[16] In most cases, and certainly for rising African-American politicians who have not had the opportunity to establish a political record, a majority black district is required to ensure a fair opportunity to elect a black candidate of choice in and around the Third District of Virginia.

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it could be drawn, as a statement suggesting that DOJ would not require a majority black district to remedy unlawful vote dilution. (J.S. App. 20-21.) Similarly, the district court makes a blatantly unfair comparison of the Virginia record to that of North Carolina, in an effort to discount the fact that several § 2 violations had been found in local contests in jurisdictions within and surrounding the Third District. In Virginia, five jurisdictions located within the Third District have had § 2 violations adjudicated or settled, and the areas of those jurisdictions which had the § 2 violations are contained within the Third District. *See Shaw II*, 116 S.Ct. at 1905-07; *Bush*, 116 S.Ct. at 1969-70 (districting that "substantially" addresses the § 2 violation may satisfy strict scrutiny).

[15] *See* Table 1, J.S. App. 84.

[16] Plaintiffs' and defendant's experts agree that black voter turnout has greatly declined since 1989 to levels below white turnout, particularly in the area of the Third District. (P.E. 22, pp. 50, 52, 62, 66; D.E. 1, p. 27.) Given this drop in black voter turnout, a trend which had already begun by 1991, an effective black district would have to be at least 58% black VAP in order for black voters to constitute an electoral majority on election day. (D.E. 1, p. 27.)

3. The district court erred in concluding that Virginia's Third Congressional District was not narrowly tailored by failing to afford deference to the Virginia legislature's race-conscious effort to remedy unlawful vote dilution in the area of the Third District.

The district court improperly concluded, for exactly the same reasons it concluded the district was subject to strict scrutiny, that the district was not narrowly tailored to meet any compelling state interest. In so doing, the district court failed to recognize that once a state establishes a compelling state interest, the challenged district is entitled to even more deference than is afforded in the initial determination of whether strict scrutiny applies. Districting is primarily the prerogative of the state, and unlike the use of race in virtually every other context, the use of race in districting practices is permitted, indeed, even required by federal law.

States which have a compelling interest to create a race conscious district are afforded some "leeway" to meet this interest in a manner consistent with other districting goals. *Bush*, 116 S.Ct. at 1960. Strict scrutiny does not require a state to create a district having "the least possible amount of irregularity in shape." *Id.* A district drawn to comply with § 2 fails strict scrutiny only if it misuses race to achieve objectives above and beyond legitimately addressing the § 2 concerns, resulting in a district which is "bizarrely shaped and far from compact." *Id.* at 1970 (O'Connor, J. concurring). As the plurality opinion of this Court states:

> A § 2 district that is *reasonably* compact and regular, taking into account traditional districting principles . . . may pass strict scrutiny without having to defeat rival compact districts designed by plaintiffs' experts in endless "beauty contests."

Id. at 1960 (emphasis in the original).

The district court reached its erroneous conclusion by improperly comparing Virginia's Third District to the unmistakably bizarre districts this Court invalidated in Texas. Such

comparison is unfair and baseless, even upon a simple "eyeball" examination of the districts. The Virginia record is distinguishable from the record in Texas for another important reason: in Virginia, race was not "misused" to achieve districting goals above and beyond meeting the requirements of § 2. Virginia did not use race as a proxy for Democratic votes to achieve partisan political advantage.

The district court virtually ignored the other undisputed evidence that the Third District is narrowly tailored. The Third District is not significantly less compact or less regular in shape than other districts drawn for purely nonracial reasons by the General Assembly. Virginia's overall plan does not achieve, much less exceed, proportional representation. *See Johnson v. DeGrandy*, 512 U.S. 997, ___, 114 S.Ct. 2647, 2651 (1994). The Virginia General Assembly did not create a greater number of majority-minority districts than was reasonably necessary to address the § 2 compelling state interest, and the Third District does not "pack" more voters into the District than is reasonably necessary to provide black voters with a fair opportunity to elect a candidate of their choice. The Virginia General Assembly declined to "maximize" minority voting strength, despite intense political pressure from minority interest groups to do so. The Third District reasonably respects Virginia's traditional districting principles, and the Third District does not take race into account "substantially more than is reasonably necessary" to comply with § 2 of the Voting Rights Act. *Bush*, 116 S.Ct. at 1961.

CONCLUSION

This Court should note probable jurisdiction of this appeal and reverse the judgment of the district court.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

DONALD MOON, et al., Plaintiffs,	)	
v.	)	Civil Action No.
M. BRUCE MEADOWS, Defendant,	)	3:95CV942
and	)	(Filed Feb. 7, 1997)
CURTIS W. HARRIS, et al., Defendant-Intervenors.	)	

ORDER

For the reasons stated in the Court's Memorandum in this cause, it is ADJUDGED, ORDERED AND DECREED as follows: The Plaintiffs' prayer that Title 42 U.S.C. § 1973 be declared as having no further force and effect, insofar as it requires the Commonwealth of Virginia to seek preclearance of its state-wide redistricting plan, be and the same is hereby DENIED for failure to prosecute.

It is ADJUDGED AND DECLARED that that portion of Virginia Code Section 24.2-302 dealing with the Third Congressional District of Virginia be and the same is of no further force and effect insofar as it purports to establish the geographic boundaries of a Third Congressional District for the Commonwealth of Virginia on the grounds that same is violative of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

IT IS FURTHER ADJUDGED, ORDERED AND DECREED that the Defendants, its agents, servants, employees and all persons acting in concert therewith are enjoined from coordinating and/or conducting an election of any person to membership in the United States House of Representatives from the Third Congressional District until such time as the Virginia General Assembly enacts, and the Governor approves, a new redistricting plan for said district which conforms to all requirements of law, including the Constitution of the United States.

Plaintiffs are entitled to reasonable counsel fees and all taxable costs.

Let the Clerk send a copy of this Order and the Court's Memorandum to all counsel of record.

/s/ H. Emory Widener, Jr.
UNITED STATES CIRCUIT JUDGE

/s/ Robert R. Merhige, Jr.
UNITED STATES DISTRICT JUDGE

/s/ T.S. Ellis, III
UNITED STATES DISTRICT JUDGE

Date 2-7-97

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

DONALD MOON, et al., Plaintiffs,	)	
v.	)	Civil Action No.
M. BRUCE MEADOWS, Defendant,	)	3:95CV942
and	)	(Filed Feb. 7, 1997)
CURTIS W. HARRIS, et al., Defendant-Intervenors.	)	

MEMORANDUM

MERHIGE SENIOR DISTRICT JUDGE:

The primary issue before this Court is the constitutionality of Virginia's allegedly racially-gerrymandered Third Congressional District. This action arises under Articles I, II and IV, § 2, of the United States Constitution; the First, Fifth, Fourteenth and Fifteenth Amendments; 42 U.S.C. § 1973, et seq., and 42 U.S.C. §§ 1981 and 1983. Since all Defendants, including intervenors, reside and vote in the Commonwealth of Virginia, and Plaintiffs suffered their alleged injuries in the Eastern District of Virginia, venue is appropriate under 28 U.S.C. § 1391(b). The Court has jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343(3) and (4). Because Plaintiffs challenged the constitutionality of the apportionment of Virginia's Third Congressional District, pursuant to 28 U.S.C. § 2284 a district court panel of three judges presided over the case, and its disposition is now ripe.

The sole remaining original Defendant is M. Bruce Meadows, Secretary of the State Board of Elections and a member of that Board. The Board of Elections is responsible for coordinating the conduct of elections in the Commonwealth and issuing certificates of elections. Mr. Meadows is sued on behalf of the Board and in his official capacity.

The results of the 1990 decennial census entitled Virginia to an additional seat in the House of Representatives which is the subject of the present controversy. Plaintiffs seek a declaratory judgment that Va. Code § 24.2-302, which sets out the geographical boundaries of each of Virginia's congressional districts, is unconstitutional. They further seek a judgment that 42 U.S.C. § 1973 is of no further force and effect insofar as it requires the Commonwealth of Virginia to seek preclearance of its statewide redistricting plans. Plaintiffs' challenge to Va. Code § 24.2-302 must, except for that portion of the statute dealing with the Third Congressional District, fail for lack of standing.

The Court, having considered all of the evidence introduced by each of the parties, including intervenors, all exhibits entered in the record, stipulations, argument, and proposed Findings of Fact and Conclusions of Law concludes as follows:

That portion of the Complaint in which Plaintiffs pray that the Court declare 42 U.S.C. § 1973 to be of no further force and effect, insofar as it requires the Commonwealth of Virginia to seek preclearance consistent with constitutional requirements, is unsupported by any

evidence as to jurisdiction or the merits. This claim will be dismissed for failure to prosecute.

Each of the Plaintiffs votes and resides in the Third Congressional District and therefore has standing only to challenge that District as violating the Equal Protection Clause of the Fourteenth Amendment to the Constitution. The Plaintiffs claim that they have been subjected to "the deliberate segregation of voters into [a] separate and bizarre-looking district[s] on the basis of race in violation of the Equal Protection Clause of the Fourteenth Amendment." *See Shaw v. Hunt*, 116 S.Ct. 1894 (1996); *Bush v. Vera*, 116 S.Ct. 1941 (1996); *Miller v. Johnson*, 115 S.Ct. 2475 (1995); *United States v. Hays*, 115 S.Ct. 2431 (1995).

BACKGROUND:

Between the years 1980 and 1990, Virginia's population grew from 5,346,818 to 6,187,35 [sic] – approximately 15.7%. The black population during the decade grew by about 154,326, so that they now constitute 18.9% of the state's population. Because this population increase entitled Virginia to an additional seat in the United States House of Representatives the General Assembly began redistricting the state to create an eleventh Congressional district. The Chairman of the Joint Privileges and Elections Committee of the Virginia Senate and House of Delegates invited the National Association for the Advancement of Colored People ("NAACP"), the American Civil Liberties Union ("ACLU"), and Virginia's Congressional delegation to use the General Assembly's computer-assisted redistricting system for preparing suggested Congressional district plans and to submit them for the Committee's consideration.

The Virginia NAACP and the ACLU presented similar proposals for a majority black Congressional district which would combine black populations concentrated in urban areas (Henrico County and the Cities of Richmond, Petersburg, Norfolk, Newport News, Hampton, Portsmouth, and Chesapeake) linked by more rural areas along the James River. The ACLU's proposed district contained 66.2% total black population and 63.1% black Voting Age Population ("VAP"). The NAACP's proposed district had 65.4% total black population and 62.1% black VAP.

The Democratic Party Chairman of the 8th Congressional District and Chairman of the American Party each offered statewide proposals. Analysis by the Virginia Division of Legislative Services staff revealed that the latter two proposals each advocated one black majority district with approximately a 54% total black population.

Then State Senator Robert Scott, a Democrat and a member of the Black Caucus, along with Delegate Kenneth Melvin, (also a Democrat and a member of the Black Caucus, as well as a member of the Virginia House Privileges and Elections Committee) each suggested a 55% black majority district and a 45% black influence district as an alternative to one 65% majority district.

Between October 11 and November 20, 1991, the General Assembly conducted hearings and considered additional working draft plans. Of the ten plans receiving consideration, no less than seven proposed that more than 65% of the total population of District 3 be composed of blacks. No plan suggested a District population with a black percentage of less than 60.35%.

On November 20, 1991, the General Assembly of Virginia passed the first version of the statute in issue, providing for a 61.48% black majority of the total population of the new Third Congressional District and a 58.5% black VAP. Following the legislative action, the Act was forwarded to the Governor for his consideration. The Governor, as his right, proposed several revisions including an increase in the black population from 61.48% to 63.98% and an increase in the black percentage of VAP from 58.50% to 61.17%. Additionally, the Governor suggested a shift of predominately black Norfolk precincts from District Two to District Three with a total population of 28,525, 72.5% of whom were black. The Governor also suggested shifting predominately white Norfolk precincts from District Three to District Two. The population affected by this shift was 38,539, 25.93% of whom were black.

The General Assembly adopted the Governor's changes, enacted the plan in Va. Code § 24.2-203 and submitted it to the United States Department of Justice. By letter dated February 18, 1992, the Department of Justice precleared the plan as submitted.

The General Assembly twice enacted technical modifications to the approved bill complying each time with General Assembly Guidelines. These Guidelines required that any proposed changes *not* substantively change the boundaries of the district and that "no change will reduce the black percentage of total or voting age population in the majority black district (District 3)".[1] The Governor

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[1] Guidelines For a Bill to Make Technical Adjustments to the December 1991 Congressional Redistricting Bill which

approved the plan and the newly established Third Congressional District elected Senator Scott as its first Congressman.

The District has been aptly described as follows:

The Third congressional District, as presently configured, is an amalgamation principally of African-American citizens contained within the legislatively determined boundaries for the obvious purpose of establishing a safe black district. The district is anchored in the tidewater cities of Norfolk, Suffolk, and Portsmouth. It crosses the Chesapeake Bay to include portions of the cities of Hampton and Newport News where the African-American population is the majority, using only the open water of the Chesapeake Bay and the James River to connect the disparate and non-contiguous portions of these two small cities. The District then crosses the James River into the largely rural Surry County, recrossing the James River to take in all of the African-American majority Charles City County. In Charles City County the district splits in three directions. To the south the District runs through Prince George County and slices through the City of Hopewell, including only those areas where blacks predominate, before terminating some 30 miles away in the City of Petersburg, which it also divides racially. To the east, the District takes in part of rural southeastern Henrico County before reaching the more built up and heavily black eastern suburbs of Richmond, racially dividing the capital city nearly in half before terminating in a small

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accompanied a January 9, 1992 letter to City/County Election officials.

black neighborhood in northern Henrico County. To the north, the district widens out to take all of the rural and agricultural counties of New Kent, King William, [sic] King and Queen, and ends its roughly 225 mile trek in Essex County along the banks of the Rappahannock River. (Pl.'s Complaint).

DISCUSSION

In order to successfully challenge the Third District, Plaintiffs must first prove that the General Assembly's predominant reason for drawing its boundaries was race. The Supreme Court enunciated the breadth of a plaintiff's burden in a challenge to a racial gerrymander by stating that:

> The plaintiff's burden is to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district. To make this showing a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles including, but not limited to compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, to racial considerations.

Miller, 115 S.Ct. at 2486 [sic].

Once a plaintiff proves that race predominates, the State must then justify its use of race under the strict scrutiny standard. Courts apply this rigorous standard because "the purpose of strict scrutiny is to 'smoke out'

illegitimate uses of race by assuring that [the State] is pursuing a goal important enough to warrant use of a highly suspect tool." *Richmond v. Croson*, 488 U.S. 469, 493 (1989). To satisfy strict scrutiny in this context, "the State must demonstrate that its redistricting [sic] legislation is narrowly tailored to achieve a compelling governmental [sic] interest." *Miller*, 115 S.Ct at 2490; *Vera v. Richards*, 861 F.Supp. 1394, 1336 (S.D.Tex. 1994), *aff'd sub nom Bush v. Vera*, 116 S.Ct 1941 (1996) ("State's burden is to produce evidence that any districts found to be racially gerrymandered were dictated by a compelling state interest and are narrowly tailored.").

In evaluating the proffered compelling state interest, the Court must determine whether the articulated justification was identified at the time of the plan's enactment, and be satisfied that the Legislature was seeking to remedy a real violation of law. *Shaw*, 116 S.Ct. at 1902; *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 279 (1986) (state must have convincing evidence that remedial action is necessary before implementing affirmative action.) Once the state establishes a compelling state interest, the Court must determine whether the district was narrowly tailored to achieve that compelling interest. *Wygant*, 476 U.S. at 279.

A. Does Race Predominate?

The evidence, in our view, is overwhelming that the creation of a safe black district predominated in the drawing of the boundaries of the Third Congressional District. Racial consideration was second only to the

legally required population standard. Indeed, the Commonwealth admits as much. In seeking approval of the Department of Justice, the then Attorney General of Virginia attached to the Commonwealth's Section 5 preclearance submission a narrative statement that

> [T]he addition of an eleventh congressional district caused the ideal population for a congressional district to remain relatively constant and minimized the potential changes in the area of low growth. Extensive redrawing of district lines was necessitated in the remainder of the Commonwealth, however, to meet ideal population standards, establish a majority Black district, and create a new open district in the Northern Virginia area of highest population growth.

Strikingly, the Attorney General omitted any reference that the traditional race-neutral criteria such as compactness, contiguity, adherence to political subdivision boundaries, or the preservation of interest were considered in the redistricting process.

Evidence of legislative intent, the bizarre shape of the district, and the subordination of traditional districting principles demonstrate that the Commonwealth intentionally drew the Third District's boundary lines to include black populations for the purpose of ensuring "that Black voters in the Commonwealth will be able to elect candidates of their choice."[2]

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[2] Attachment 4 dealing with Statement of Anticipated Minority Impact.

Legislative intent

The General Assembly's initial plan,[3] created a congressional district that was 61.48% African-American in total population and 58.50% African-American in voting age population. Throughout the redistricting process, the Legislature sought to protect and indeed enhance this initial ratio. The General Assembly's guidelines specifically prohibited any "change[s] [which] will reduce the black percentage of total or voting age population in the majority black district (District 3)." Guidelines for a Bill to Make Technical Adjustments to the December 1991 Congressional Redistricting Bill § *B*.

The "Summary District Analysis" document details the changes proposed by the Governor to the General Assembly.[4] Of particular importance as to whether race predominated in the creation of the final plan is the section of the Summary Analysis subtitled "*C. Increase the Black Population Percentage in District 3.*" This document outlines how the Governor proposed to increase the African-American percentage in District 3 by making adjustments in Districts 1, 2, 3, and 4. For example, the Fort Eustis area in Newport News was moved to District 3 from District 4. In turn, District 4 picked up a part of Virginia Beach to offset the shift of Fort Eustis to District 3. Then, a majority white populated area of Norfolk was

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[3] This plan is labeled the Conferees Report of November 20, 1991 (C0705552) in the preclearance submissions documents to the Department of Justice.

[4] Congressional District Plan, Governor's Amendments plan C0723750. *See* Jt.Ex.25A.

moved from District 3 to District 2 in exchange for African-American areas in Norfolk, which were shifted to District 3 from District 2. The document reports that the areas of Norfolk moved to District 3 are 72.50% African-American, while the parts of Norfolk shifted to District 2 are 25.93% African-American. These population shifts increased the African-American percentage of the total population to 63.98% and the African-American percentage of the voting age population to 61.17% in District 3. The Governor's proposed changes were adopted and became Chapter 6 of the 1991 Virginia Acts.

Further evidence that race played the predominant role in the development of the new Congressional district as well as the adjoining districts comes from the 1992 and 1993 amendments to the plan. Notably, all of the changes affected only Districts 1 and 3. Although a primary reason for adjusting the districting plan's boundaries before the 1992 and 1994 elections was to reduce the number of split precincts in the plan, the technical amendments resulted in an increase in the Black percentage of the total population to 64.08% and the Black percentage of the voting age population to 61.24% in District 3.

The 1993 amendments moved all of Richmond County, whose population was roughly 69.8% white and 30.2% Black from District 3 to District 1. Still another change effected at that time was the movement of the entire population of James City County which was approximately 80% white and 20% black from District 3 to District 1.

In the preclearance submission, the General Assembly explained that moving Richmond County and James

City County to District 1 was offset by shifting parts of the cities of Newport News and Hampton to District 3. The preclearance documents, however, report that the shift of lines in Newport News used race for making the changes by moving a portion of Black population in a particular precinct of the City into District 3 from District 1. These moves were, in the Court's view, a deliberate and integral part of Virginia's predominant attention to the principal goal of creating a safe black district. In the Third Congressional District, these amendments increased the Black percentage of the total population to 64.37% and the Black percentage of the voting age population to 61.6%.

Bizarre Shape

Not only does the direct evidence support the Court's conclusion, the shape and racial characteristics of the district prove that race predominated in drawing its boundaries. The Supreme Court in *Shaw* noted that the appearance of a district was important in evaluating racial gerrymanders. *Shaw v. Reno*, 509 U.S. 630, 646 (1993) ("[W]e believe that reapportionment is one area where appearances do matter."). State newspapers, admitted into evidence, have described the district as a "grasping claw" or a "squashed salamander." There is little doubt that to establish a safe black district, the Virginia Legislature drew a district with bizarre geographical boundaries. The congressional plan in effect throughout Virginia from 1981 to 1991 split three counties and two cities between congressional districts. The present redistricting divides eight cities, all by the boundaries of the Third Congressional District. Of the

seventeen localities comprising part of the Third Congressional District, eleven are divided into two Congressional districts. Of the 562,351 persons in the Third Congressional District, 513,588 are from jurisdictions divided between congressional districts. The unwieldy and distended shape of the Third District confirms the use of race to draw its boundaries.

Plaintiffs' exhibits Px1, and 2A through 2H display more effectively than the written word the distended and unwieldy shape of the Third District.[5] These exhibits display how the boundaries within each of the cities adhere to racial characteristics, and display how most of the precincts split along racial lines. Exhibit Px3 confirms that the Legislature relied on the classification of voters based upon race at the census block [sic] level to divide precincts and apportion large number of voters based on race into, and out of, the Third District. The division of cities on an unprecedented scale cannot be explained on any grounds other than race.[6]

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[5] See attachment copies of Px1 and Px2A through Px2H which are made a part of this document.

[6] The CAMCAR computer system employed by the General Assembly to assist in redrawing the district lines provided the legislators with information with respect to the various political units, precincts, counties, and cities, as well as the smaller nonpolitical unit of census blocks [sic]. (Def. S.J.Ex. at 35.) From the precinct level up, the computer provided not only the population of each political unit, but also its racial composition based on three categories, white, black and other. CAMCAR also displayed actual election results for each political unit for the years 1983-1989.

No such election statistics are available on CAMCAR for census blocks [sic], but CAMCAR does give the racial makeup

Every one of the fingers which reaches from the whole-county hub of the district, into the divided cities, uses lightly populated territory, barren stretches of river, or other dubious connectors such as highway exits which appear to be leading the wrong way in an effort to reach the black populations which it excises from the various cities.

The bizarre shape and the character of the split cities give credence and confirmation to the racial segregation manifest in this district. Except for the City of Suffolk, every one of the cities split by this district results in the black population of the city being concentrated in that portion placed in the Third District. In Richmond, the Capital of Virginia, 94.78% of a black population of 112,122 is placed in the Third District. *See* Ex. Px5. A similar examination of the precincts shows a preponderance of racial splits, although admittedly race cannot explain the split in every instance. *See* Joint Ex. 50.

While the split of a precinct may appear non-racial, a close examination leads one to the inevitable conclusion that the purpose of the split is to configure the Third District so that a concentration of non-blacks is avoided. *See* Px 3-O to Px 3T.

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of a census block [sic]. Thus the computer is more sophisticated with respect to race than to other demographic data other than total numbers. So splitting by blocks is "substantial evidence that it was race that lead to the neglect of traditional districting criteria here," just as *Bush*, 116 S.Ct. at 1953 (plurality opinion) so held in the same context.

Traditional Principles Ignored

Article II, § 6 of the Constitution of Virginia requires electoral districts to be composed of contiguous and compact territory. Article I, § 2 of the United States Constitution requires the Legislature to reapportion each electoral district so that there is "equal representation for equal numbers of people;" in short – "one person, one vote." *Weberry v. Sanders*, 376 U.S. 1, 18 (1964). The second condition is compliance with those mandates of the Federal Voting Rights Act, 42 U.S.C. §§ 1971-73. *See Katzenback v. Morgan*, 384 U.S. 641, 643-47 (1966).

The Court recognizes that in redistricting the Legislature did not ignore political partisanship, protection of incumbent office holders and the desire to keep in separate districts, where legally appropriate, military installations. But the Legislature's general disregard for keeping regions and localities intact, and its abandonment of compactness illustrate that traditional principles were subordinate to the principal reason for the make-up of District 3. Thus, whenever a non-racial adjustment was made, an adjustment elsewhere was made on the basis of race to maintain the district's racial composition. In other words, "[r]ace was the criterion that, in the State's view, could not be compromised; respecting communities of interest and protecting . . . incumbents came into play only after the race-based decision had been made." *Shaw*, 116 S.Ct. at 1901. An example of the plan's disregard for the integrity of traditional localities and regions is its increase in the number of split counties and independent cities. Prior to 1965, no cities or counties were split by Congressional district lines. The Supreme Court, as early as *Weberry*, 376 U.S. at 1, and more recently in *Karcher v. Daggett*, 462 U.S.

725 (1983), has imposed an increasingly strict standard of equality of population among Congressional districts within a State. Even so, between 1964 and 1990 districts apportioned as required resulted in the splitting of no more than five cities and counties. [Pl.Ex. 11] In contrast, as of 1993, the Congressional district plan [CO 830452] splits some 21 independent cities and counties [Pl. Ex. 7,8], with more than half of those county and city splits (11) in the Third District. Also, as completed, the entire State's redistricting had only 54 split precincts, but 37 of them were within the Third District. *See* Note 6, *supra*. The inevitable conclusion is that being a black was the predominant factor in being chosen as part of a population making up the Third Congressional District.

When questioning a plan to create what was described as a "minority-majority district," a member of Virginia's Senate and House Committees on Privileges and Elections stated, "A 66% plan does impact all the citizens of Virginia because, to reach that 66% plan, you can gerrymander to your heart's content and thus distort communities of interest throughout Virginia." It is difficult to conclude that voters whose Congressional District encompasses parts of eight cities, seventeen localities (11 of which are divided into 2 Congressional districts), six counties and over 200 road miles of territory harbor a common interest. This conclusion is reinforced by the fact that approximately two-thirds of the population are black Americans and approximately one-third are white or other Americans.

If the creation of a safe black district can be said to favor a particular political party, the law does not condemn political partisanship; political gerrymandering is

not subject to strict scrutiny. *Bush*, 116 S.Ct. at 1954 (plurality opinion). (["P]urely political gerrymandering claims" are not justiciable) (quoting *Karcher*, 462 U.S. at 740). We find, however, that the Legislature, in its effort to create a safe black district, went further than constitutionally permitted in creating a bizarre shaped district for the predominant purpose of bringing within its boundaries a population in excess of 63% black citizens.

It was inevitable that race would have been a consideration in the mind of the Legislature during the redistricting process. Strict scrutiny results from the fact that a careful review of this record reveals more than a consideration of race.

B. Strict Scrutiny

Although we find that the Plaintiffs have shown that the Legislature, in adopting the challenged district, was motivated predominantly by race, this finding does not end the case. *See Miller*, 115 S.Ct. at 2488. The burden now shifts to the Defendants to demonstrate that its districting plan for District 3 was narrowly tailored to achieve a compelling government interest. *Id.* The Court in *Miller* held that strict scrutiny applies to redistricting plans where "race was the predominant factor motivating the Legislature's [sic] decision to place a significant number of voters within or without a particular district." *Id.*

The Court concludes that the evidence proves that the creation of the Third Congressional District was not only presumptively unconstitutional, but that the Defendants have failed to produce evidence of a compelling state interest warranting the utilization of the least

restrictive means practically available. *See Borneol v. Fainter,* 467 U.S. 216 (1984).

Compelling State Interest

Defendants contend that the configuration of the Third District was drawn, in part, to comply with the Voting Rights Act of 1965 ("VRA"). It is this Court's view that this may, under appropriate circumstances, constitute a compelling state interest. *See Clark v. Calhoun County,* 88 F.3d 1393, 1403 (5th Cir. 1996). The Supreme Court has held that the "narrow tailoring" requirement of strict scrutiny allows the states a limited degree of leeway in furthering such interests. If the State has a "strong basis in evidence" for concluding that creation of a majority-minority district is reasonably necessary to comply with the requirements of section 2 of the Voting Rights Act and the districting that is based on race "substantially" addresses the § 2 violation, it may satisfy strict scrutiny. *See Bush,* 116 S.Ct. at 1969-70; *Shaw,* 116 S.Ct. at 1894.

The Commonwealth contends that it had a compelling state interest in drawing a black majority district: precluding any exposure to a § 2 violation. The Court finds, however, that Defendants' argument that the composition of District 3 was necessary to conform to the Voting Rights Act is simply in error. First, private plaintiffs aside, the Court does not find the threat of a § 2 lawsuit by the United States to be very credible. The record reflects no indication that the Department of Justice advocated a "maximization" policy for Congressional districts in Virginia. Indeed, the acting head of the Voting

Rights section for the Department of Justice spoke in Richmond prior to the redistricting process and stated that the Department did *not* read the VRA to require that if a majority black district could be created, it must be created.

Defendant-Intervenors assert that in the context of local elections, § 2 claims have been successfully prosecuted or settled in a number of localities in Virginia. They contend that this litany of litigation somehow establishes a broader § 2 harm that the Assembly chose to address when it drew District 3. Only 5 of the 13 contested localities are partially, and none are wholly, in the Third district. Thus, District 3 does not directly address the harm asserted. As the Supreme Court stated in *Shaw:* "The vote dilution injuries suffered by these persons are not remedied by creating a safe majority-black district somewhere else in the State." *Shaw,* 116 S.Ct at 1906. If a real § 2 liability exists, then the State must cure it in the affected areas.

Not only is the Court unconvinced that the district was necessary to avoid § 2 liability, the Court finds that the district does not meet the three *Gingles* preconditions necessary for such a district. *Thornburg v. Gingles,* 478 U.S. 30, 50-51 (1986). In *Gingles,* the Court held that to prove a case of vote dilution, the minority group must show three factors: 1) the group resides in a geographically compact area; 2) it is politically cohesive; and 3) that the white majority votes sufficiently as a bloc to defeat the minority's preferred candidate. *Id.* The Court finds that Defendants have failed to prove the third *Gingles* prong, and proof of the first is doubtful at best.

As discussed previously, the district does not draw upon a geographically compact group of black voters. That is shown by our discussion of the bizarre lines of the district which are designed to draw in black voters while keeping white voters out. *See* Ex. Px 22. Whether there might exist a compact enough group of enough black voters to satisfy the *Gingles* requirement is a question we need not decide, however, for we find, that the third *Gingles* requirement of white majority block [sic] voting is not met. Defendants argue that voting in and around the Third District is racially polarized such that white voters are usually able to prevent black voters from electing candidates of choice. An examination of election results proves this conclusion false. The most persuasive expert opinions in this record make clear that white bloc voting does not prevent blacks from electing their candidates of choice. *See* Weber Report, PEx.22 at 102-104. Moreover, Governor Wilder's 1989 victory and then-Senator Scott's continued election victories demonstrate that black candidates could and were elected despite the absence of a black majority district.[7]

The Virginia Legislature used the racial data at the census block [sic] level to classify voters by race and assign them based upon race to a district. There is simply no evidence that the Legislature took any steps to narrowly tailor the Third Congressional District, nor has it produced enough evidence of a compelling government interest. The bizarre and tortured shape of the district

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[7] The Court notes that of the current members of the Virginia House of Delegates, 91 are Caucasian and 9 are black.

contradicts Defendants' assertion that the district is narrowly tailored. The Supreme Court has held that non-compact districts foreclose the VRA as a compelling state justification.

> We have, however, already found that all three districts are bizarrely shaped and far from compact, and that those characteristics are predominantly attributable to gerrymandering that was racially motivated . . . These characteristics defeat any claim that the districts are narrowly tailored to serve the state's interest in avoiding liability under § 2 because § 2 does not require a State to create, on predominantly racial lines, a district that is not "reasonably compact."

Bush, 116 S.Ct. at 1961 (plurality opinion).

A mere majority of blacks apparently was not enough to satisfy the Legislature's perceived goal of avoiding § 2 liability. While the Court finds that the Legislature not only lacked a compelling state interest for its impermissible use of race, it also did not seek to accomplish its goal by narrowly-tailored methods.[8]

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[8] The ordinary rule is that we will not decide a constitutional question "unless absolutely necessary to a decision of the case." *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347 (1936) (Justice Brandeis, concurring). In *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 505 (1988) (plurality opinion), however, the Court held that a program of preferences for minority owned business failed to pass strict scrutiny because no compelling state interest had been demonstrated. The Court then proceeded to further hold that the program was not narrowly tailored. *Id.* at 508. Thus the decision affirmed the Fourth Circuit's similar holding that the program failed an examination under strict scrutiny. *J.A. Croson v. Richmond*, 822 F.2d 1355, 1360 (4th Cir. 1987).

CONCLUSION

The Third Congressional District is racially gerrymandered in violation of the Equal Protection Clause of the Fourteenth Amendment because it relies upon the classification of large numbers of Virginians by race so as to include or exclude them from that district. The Court finds that the Commonwealth of Virginia subordinated traditional districting principles, such as compactness, communities of interest, and respect for cities and counties, to accomplish its goal of a safe black district. Because race predominated in the drawing of the district, the Court applied strict scrutiny to see if the use of race was necessary to accomplish a compelling state interest. The Commonwealth has failed to prove that District 3 satisfies a compelling state interest or that it is narrowly tailored. Accordingly, this Court will strike down this district as violative of the Fourteenth Amendment to the Constitution of the United States.

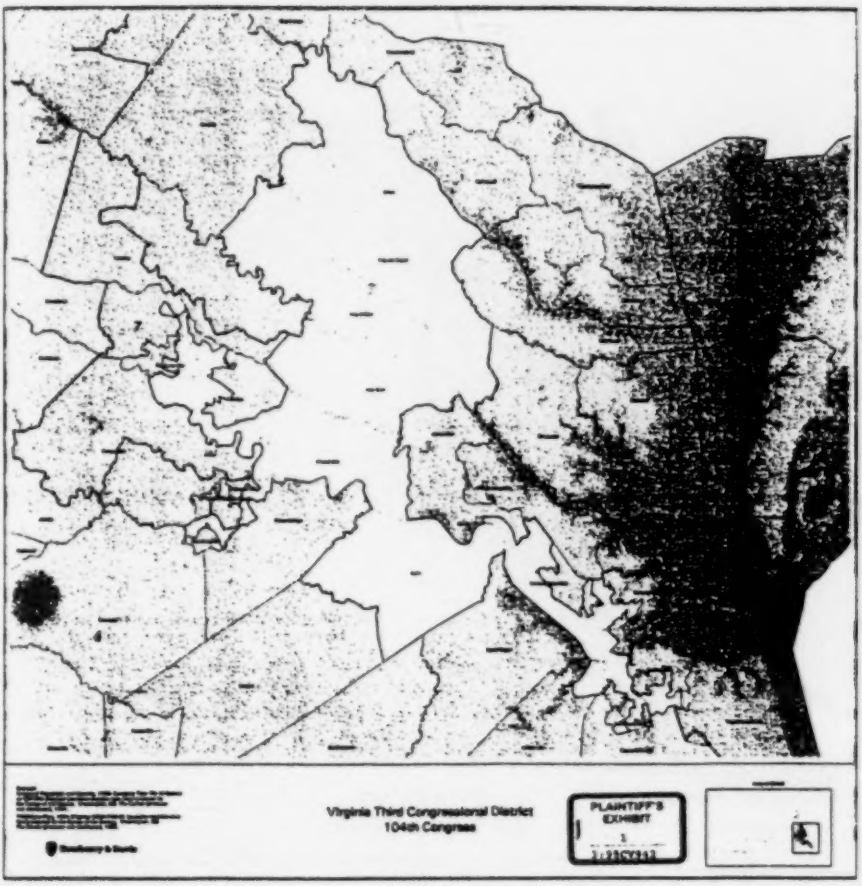
An appropriate Order shall issue.

/s/ H. Emory Widener, Jr.
United States Circuit Judge

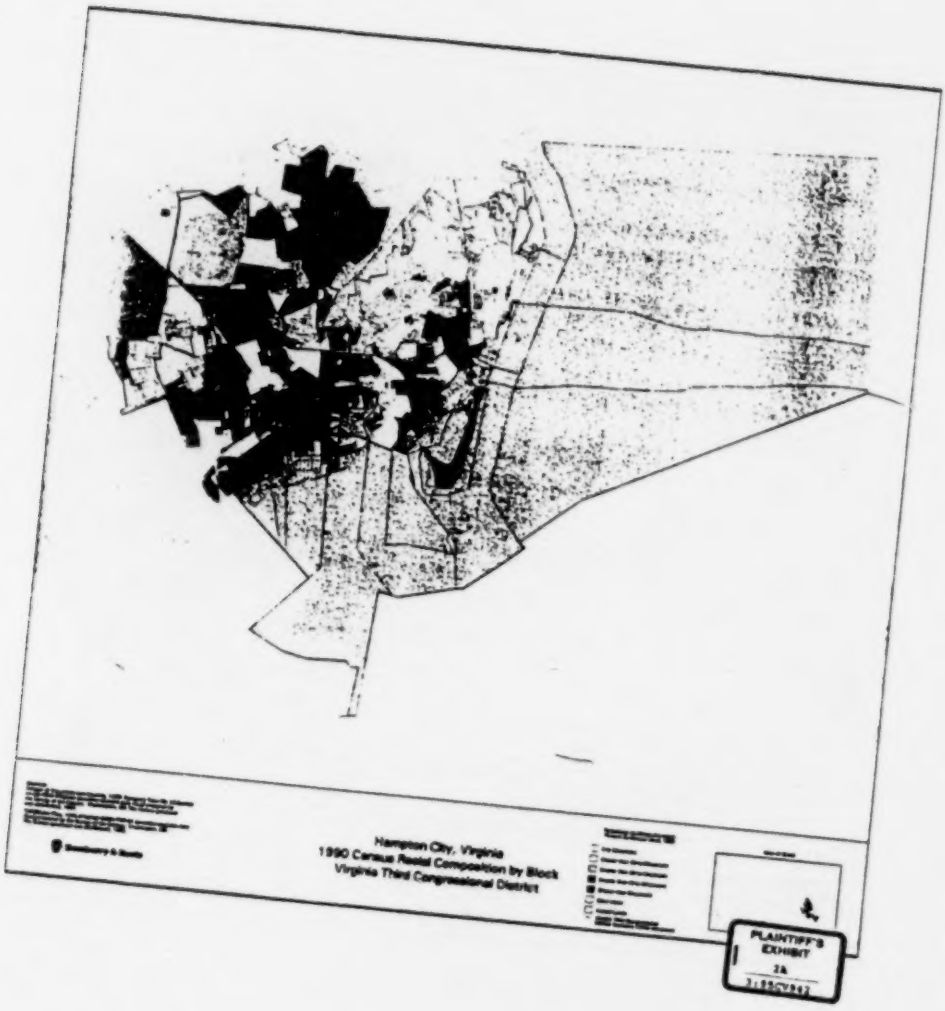
/s/ Robert R. Merhige, Jr.
United States District Judge

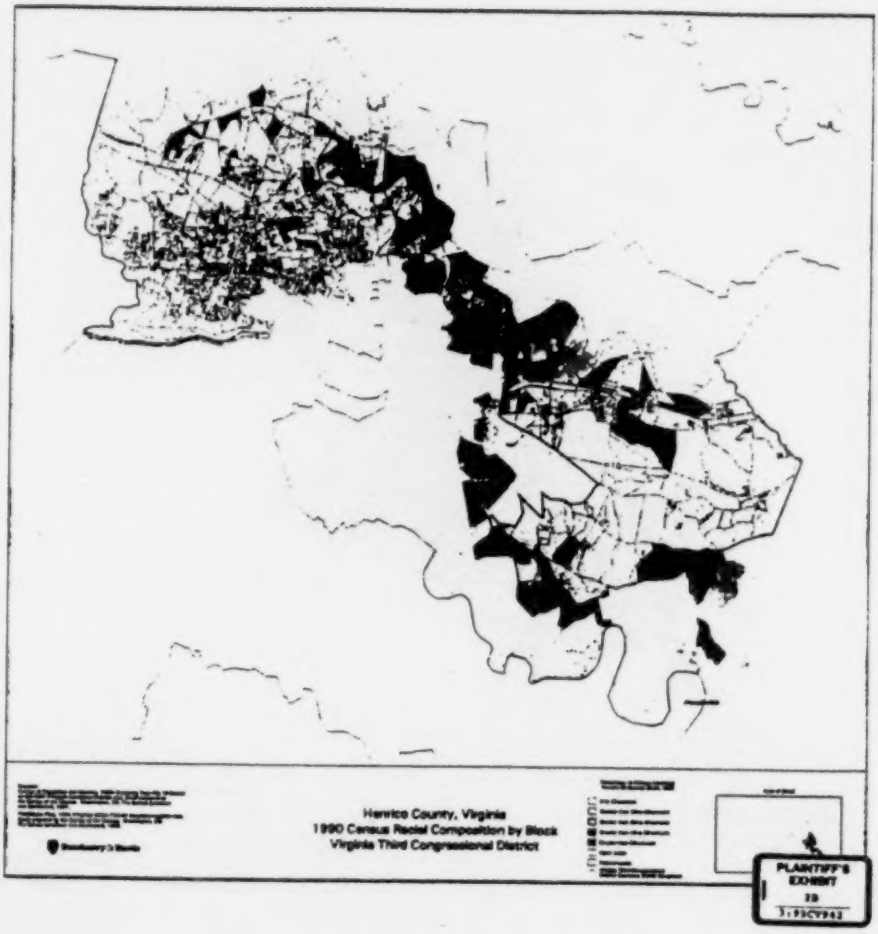
/s/ T.S. Ellis, III
United States District Judge

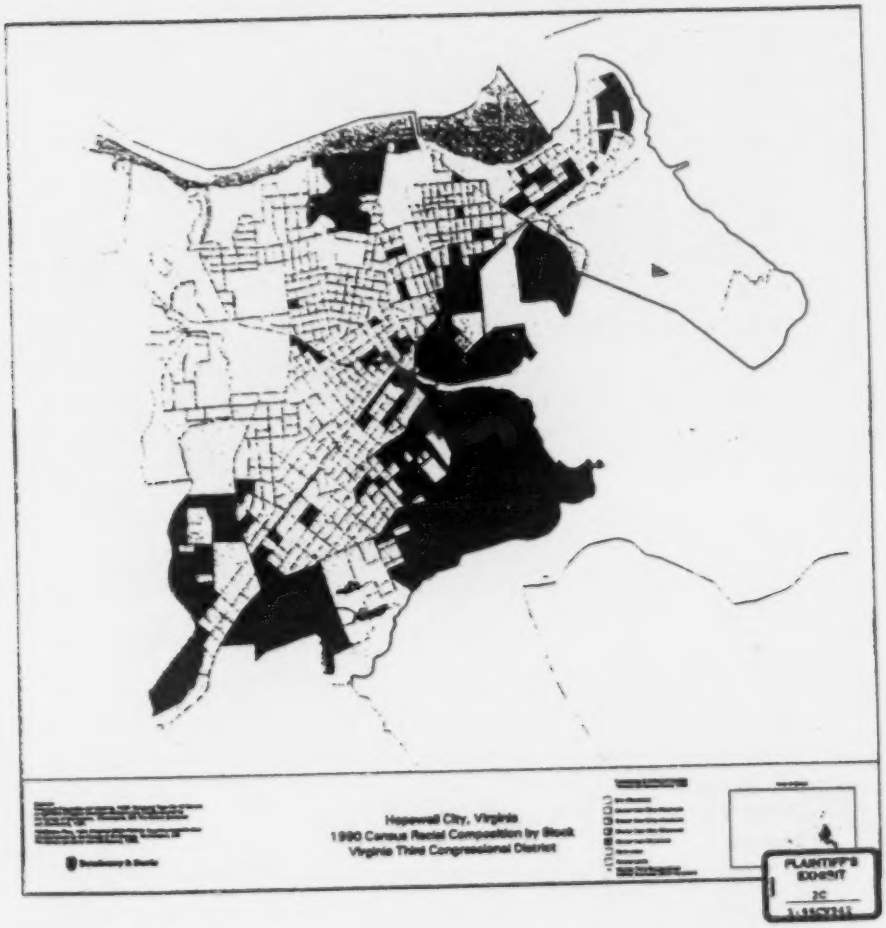
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Date



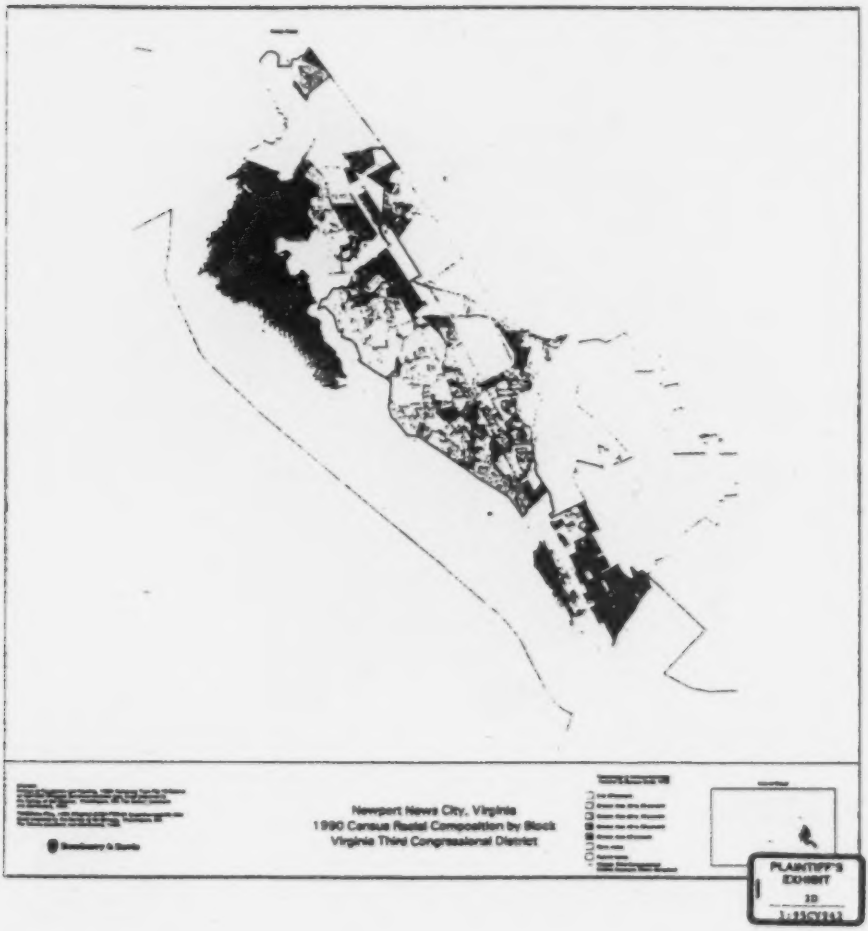
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Hampton City, Virginia
1990 Census Racial Composition by Block
Virginia Third Congressional District
PLAINTIFF'S
EXHIBIT
2A

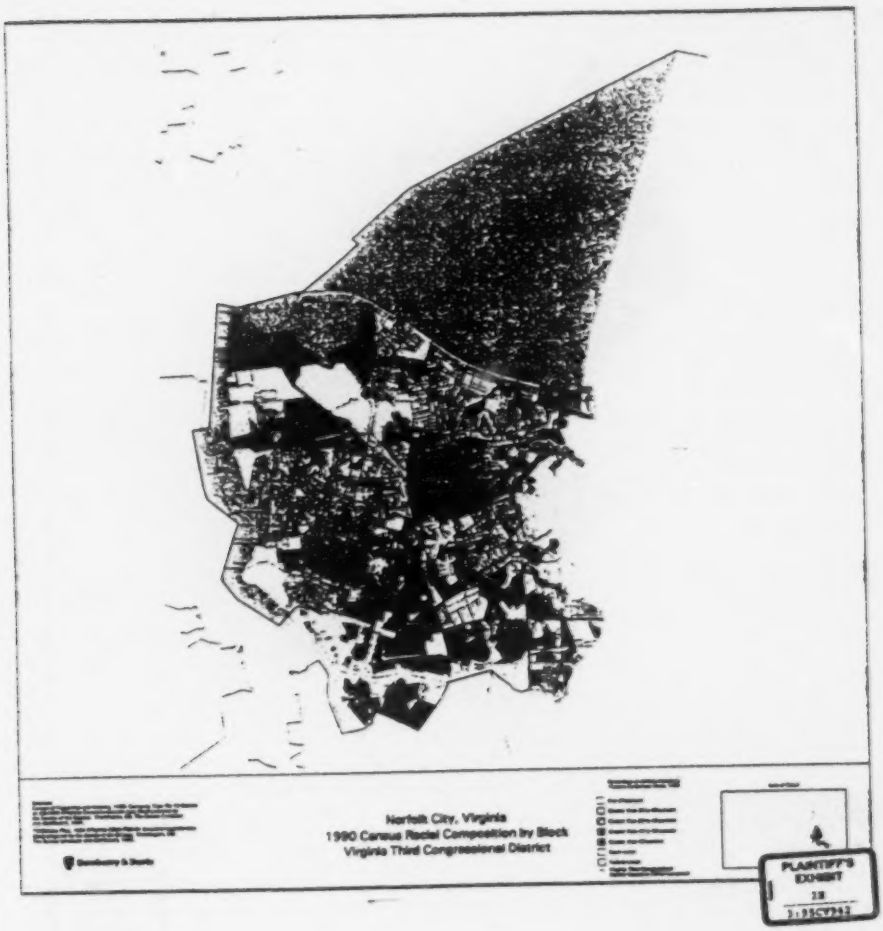

Henrico County, Virginia
1990 Census Racial Composition by Block
Virginia Third Congressional District
PLAINTIFF'S
EXHIBIT
19

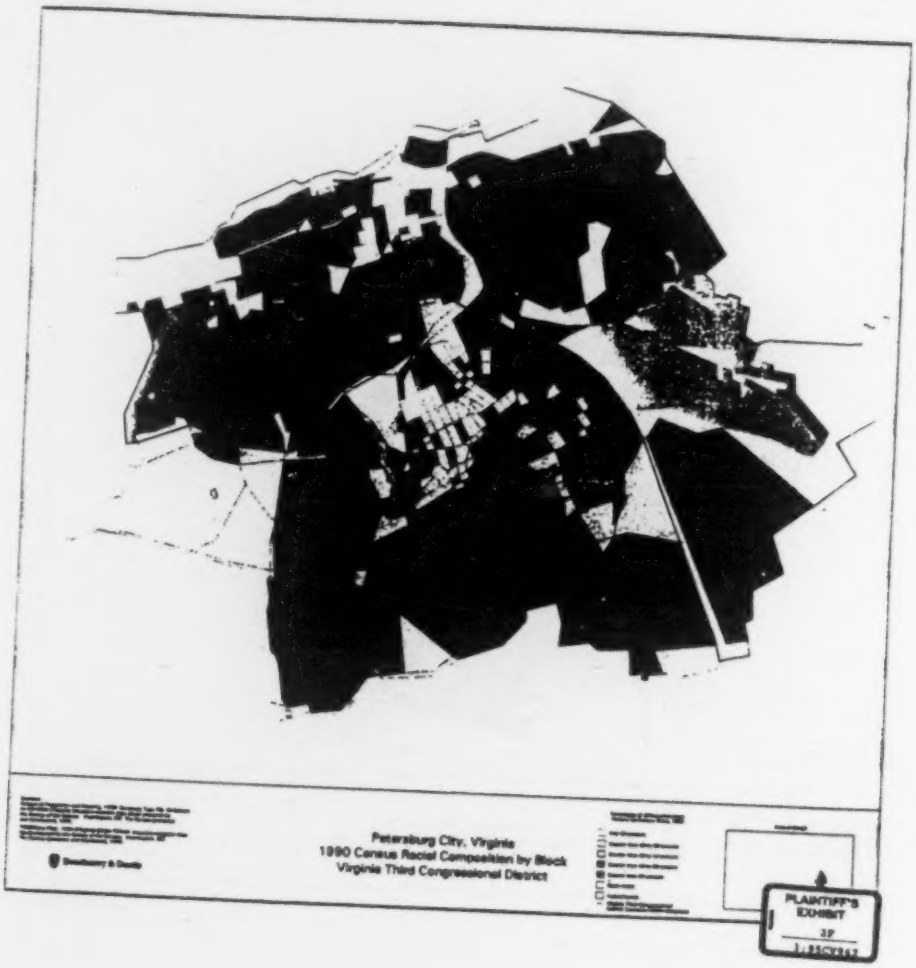

Hopewell City, Virginia
1990 Census Racial Composition by Block
Virginia Third Congressional District
PLAINTIFF'S
EXHIBIT

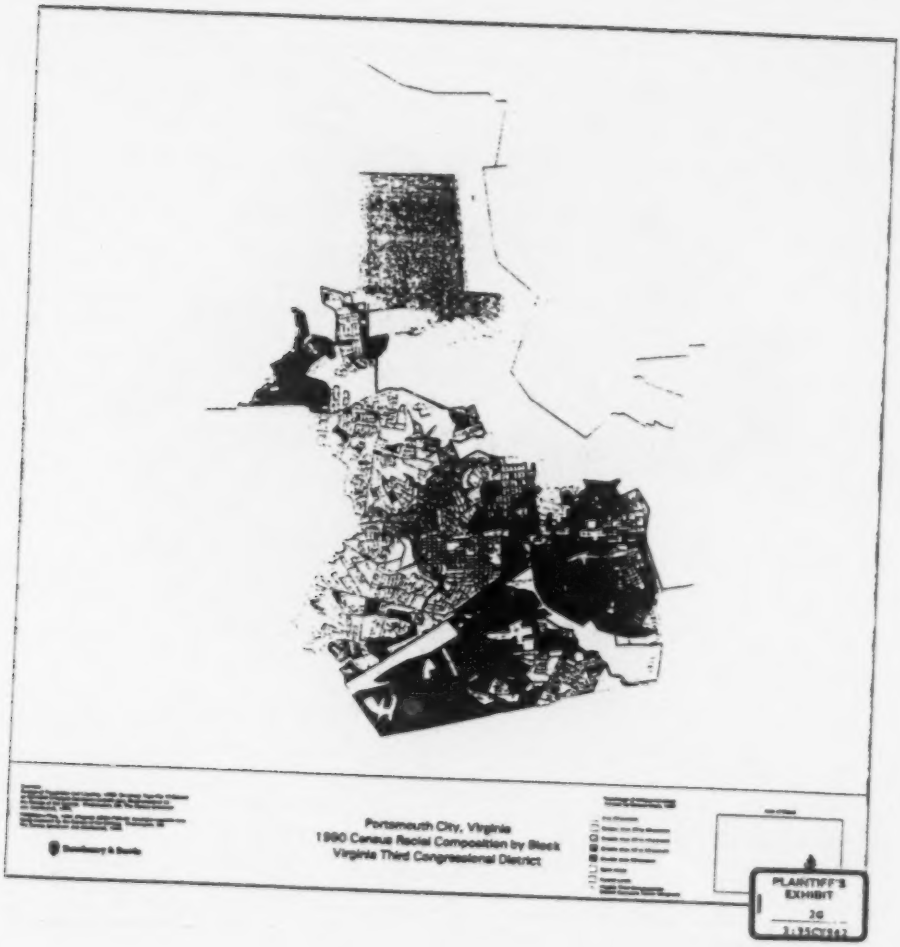
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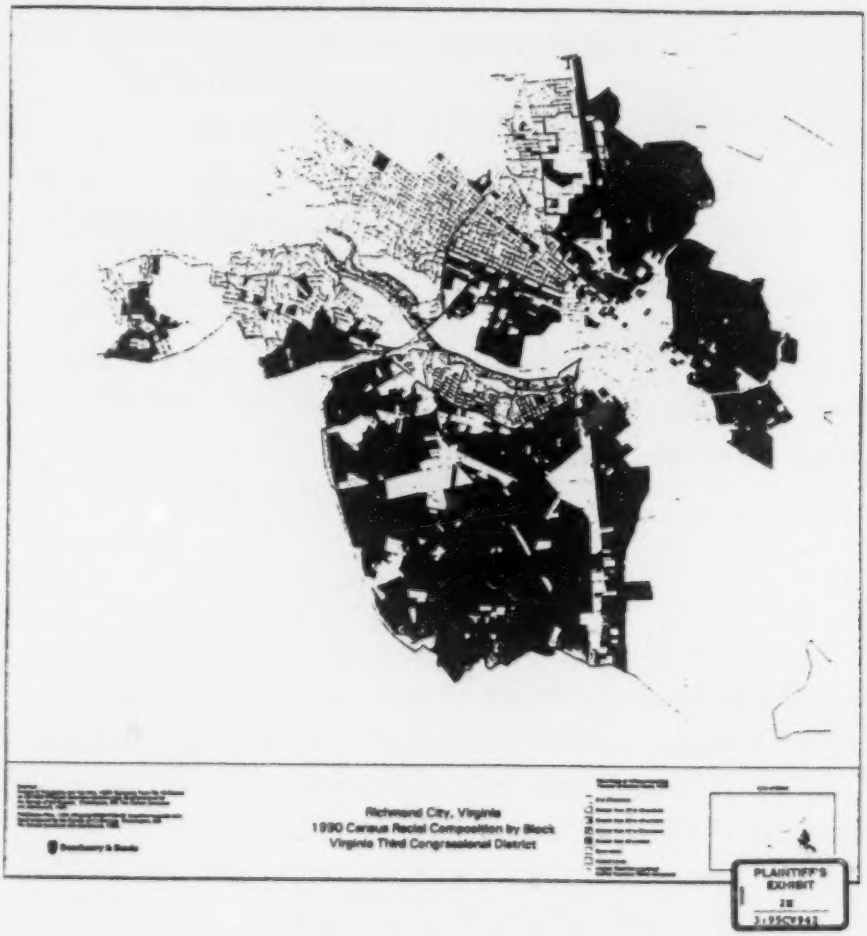

Newport News City, Virginia
1990 Census Racial Composition by Block
Virginia Third Congressional District
PLAINTIFF'S
EXHIBIT
39

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Norfolk City, Virginia
1990 Census Racial Composition by Block
Virginia Third Congressional District
PLAINTIFF'S
EXHIBIT
18


Petersburg City, Virginia
1990 Census Racial Composition by Block
Virginia Third Congressional District
PLAINTIFF'S
EXHIBIT


Portsmouth City, Virginia
1990 Census Racial Composition by Block
Virginia Third Congressional District
PLAINTIFF'S
EXHIBIT
26


Richmond City, Virginia
1990 Census Racial Composition by Block
Virginia Third Congressional District
PLAINTIFF'S
EXHIBIT
28

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA RICHMOND DIVISION

DONALD MOON and ROBERT SMITH,

Plaintiffs,

v. **C.A. No. 3:95cv942**

W. BRUCE MEADOWS,

Defendant,

and

CURTIS W. HARRIS, *et al.*,

Defendant-Intervenors.

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that the defendant, M. Bruce Meadows, Secretary of the State Board of Elections of the Commonwealth of Virginia, as authorized by 28 U.S.C. § 1253 and Rule 18.1 of the Rules of the Supreme Court of the United States, hereby appeals to the United States Supreme Court from the Order entered in the above-referenced action on February 7, 1997, by the United States District Court for the Eastern District of Virginia, sitting as a district court of three judges. The Order from which this appeal is taken grants a declaratory judgment that such portion of Virginia Code § 24.2-302, as it relates to the Third Congressional District, is unconstitutional, and enjoins the conduct of any further elections in the Third Congressional District until such time as a new district is established in conformity with all requirements of the law.

Respectfully submitted,

M. BRUCE MEADOWS

By: /s/ Frank S. Ferguson
Counsel

James S. Gilmore, III
Attorney General of Virginia

David E. Anderson
Chief Deputy Attorney General

Frank S. Ferguson
Deputy Attorney General

Claude A. Allen
Counsel to the Attorney General

Gregory E. Lucyk
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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of March, 1997, a true and correct copy of the foregoing Defendant's Notice of Appeal was mailed, postage prepaid, to:

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Richmond, Virginia 23219

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Counsel for the Defendant-Intervenors.

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United States District Court
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By Hand

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Alexandria, VA 22314
By Mail

Hon. H. Emory Widener
United States District Court
180 W. Main Street
Room 123
Abingdon, VA 24210
By Mail

/s/ Frank S. Ferguson
Counsel

AMENDMENT XIV – CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Materials for the Citizenship and Privileges and Immunities Clauses of Section 1 are set out in this volume. See the following three volumes for materials pertaining to the Due Process and Equal Protection Clauses of that section and Sections 2 to 5.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male

citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two thirds of each house, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection of rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

§ 1973. Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided,* That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

§ 1973b. Suspension of the use of tests or devices in determining eligibility to vote

(a) Action by State or political subdivision for declaratory judgment of no denial or abridgement; three-judge district court; appeal to Supreme Court; retention of jurisdiction by three-judge court

(1) To assure that the right of citizens of the United States to vote is not denied or abridged on account of race or color, no citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been made under the first two sentences of subsection (b) of this section or in any political subdivision of such State (as such subdivision existed on the date such determinations were made with respect to such State), though such determinations were not made with respect to such subdivision as a separate unit, or in any political subdivision with respect to which such determinations have been made as a separate unit, unless the United States District Court for the District of Columbia issues a declaratory judgment under this section. No citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been made under the third sentence of subsection (b) of this section or in any political subdivision of such State (as such subdivision existed on the date such determinations were made with respect to such State), though such determinations were not made with respect to such subdivision as a separate unit, or in any political subdivision with respect

to which such determinations have been made as a separate unit, unless the United States District Court for the District of Columbia issues a declaratory judgment under this section. A declaratory judgment under this section shall issue only if such court determines that during the ten years preceding the filing of the action, and during the pendency of such action –

(A) no such test or device has been used within such State or political subdivision for the purpose or with the effect of denying or abridging the right to vote on account of race or color or (in the case of a State or subdivision seeking a declaratory judgment under the second sentence of this subsection) in contravention of the guarantees of subsection (f)(2) of this section;

(B) no final judgment of any court of the United States, other than the denial of declaratory judgment under this section, has determined that denials or abridgements of the right to vote on account of race or color have occurred anywhere in the territory of such State or political subdivision or (in the case of a State or subdivision seeking a declaratory judgment under the second sentence of this subsection) that denials or abridgements of the right to vote in contravention of the guarantees of subsection (f)(2) of this section have occurred anywhere in the territory of such State or subdivision and no consent decree, settlement, or agreement has been entered into resulting in any abandonment of a voting practice challenged on such grounds; and no declaratory judgment under this section shall be entered during the pendency of an action commenced before the filing of an action

under this section and alleging such denials or abridgements of the right to vote;

(C) no Federal examiners under subchapters I-A to I-C of this chapter have been assigned to such State or political subdivision;

(D) such State or political subdivision and all governmental units within its territory have complied with section 1973c of this title, including compliance with the requirement that no change covered by section 1973c of this title has been enforced without preclearance under section 1973c of this title, and have repealed all changes covered by section 1973c of this title to which the Attorney General has successfully objected or as to which the United States District Court for the District of Columbia has denied a declaratory judgment;

(E) the Attorney General has not interposed any objection (that has not been overturned by a final judgment of a court) and no declaratory judgment has been denied under section 1973c of this title, with respect to any submission by or on behalf of the plaintiff or any governmental unit within its territory under section 1973c of this title, and no such submissions or declaratory judgment actions are pending; and

(F) such State or political subdivision and all governmental units within its territory –

(i) have eliminated voting procedures and methods of election which inhibit or dilute equal access to the electoral process;

(ii) have engaged in constructive efforts to eliminate intimidation and harassment of persons exercising rights protected

under subchapters I-A to I-C of this chapter; and

(iii) have engaged in other constructive efforts, such as expanded opportunity for convenient registration and voting for every person of voting age and the appointment of minority persons as election officials throughout the jurisdiction and at all stages of the election and registration process.

(2) To assist the court in determining whether to issue a declaratory judgment under this subsection, the plaintiff shall present evidence of minority participation, including evidence of the levels of minority group registration and voting, changes in such levels over time, and disparities between minority-group and non-minority-group participation.

(3) No declaratory judgment shall issue under this subsection with respect to such State or political subdivision if such plaintiff and governmental units within its territory have, during the period beginning ten years before the date the judgment is issued, engaged in violations of any provision of the Constitution or laws of the United States or any State or political subdivision with respect to discrimination in voting on account of race or color or (in the case of a State or subdivision seeking a declaratory judgment under the second sentence of this subsection) in contravention of the guarantees of subsection (f)(2) of this section unless the plaintiff establishes that any such violations were trivial, were promptly corrected, and were not repeated.

(4) The State or political subdivision bringing such action shall publicize the intended commencement and any proposed settlement of such action in the media serving such State or political subdivision and in appropriate United States post offices. Any aggrieved party may as of right intervene at any stage in such action.

(5) An action pursuant to this subsection shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court. The court shall retain jurisdiction of any action pursuant to this subsection for ten years after judgment and shall reopen the action upon motion of the Attorney General or any aggrieved person alleging that conduct has occurred which, had that conduct occurred during the ten-year periods referred to in this subsection, would have precluded the issuance of a declaratory judgment under this subsection. The court, upon such reopening, shall vacate the declaratory judgment issued under this section if, after the issuance of such declaratory judgment, a final judgment against the State or subdivision with respect to which such declaratory judgment was issued, or against any governmental unit within that State or subdivision, determines that denials or abridgements of the right to vote on account of race or color have occurred anywhere in the territory of such State or political subdivision or (in the case of a State or subdivision which sought a declaratory judgment under the second sentence of this subsection) that denials or abridgements of the right to vote in contravention of the guarantees of subsection (f)(2) of this section have occurred anywhere in the territory of such State or subdivision, or if, after the issuance of such

declaratory judgment, a consent decree, settlement, or agreement has been entered into resulting in any abandonment of a voting practice challenged on such grounds.

(6) If, after two years from the date of the filing of a declaratory judgment under this subsection, no date has been set for a hearing in such action, and that delay has not been the result of an avoidable delay on the part of counsel for any party, the chief judge of the United States District Court for the District of Columbia may request the Judicial Council for the Circuit of the District of Columbia to provide the necessary judicial resources to expedite any action filed under this section. If such resources are unavailable within the circuit, the chief judge shall file a certificate of necessity in accordance with section 292(d) of Title 28.

(7) The Congress shall reconsider the provisions of this section at the end of the fifteen-year period following the effective date of the amendments made by the Voting Rights Act Amendments of 1982.

(8) The provisions of this section shall expire at the end of the twenty-five-year period following the effective date of the amendments made by the Voting Rights Act Amendments of 1982.

(9) Nothing in this section shall prohibit the Attorney General from consenting to an entry of judgment if based upon a showing of objective and compelling evidence by the plaintiff, and upon investigation, he is satisfied that the State or political subdivision has complied with the requirements of subsection (a)(1) of this section.

Any aggrieved party may as of right intervene at any stage in such action.

(b) Required factual determinations necessary to allow suspension of compliance with tests and devices; publication in Federal Register

The provisions of subsection (a) of this section shall apply in any State or in any political subdivision of a state[1] which (1) the Attorney General determines maintained on November 1, 1964, any test or device, and with respect to which (2) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 per centum of such persons voted in the presidential election of November 1964. On and after August 6, 1970, in addition to any State or political subdivision of a State determined to be subject to subsection (a) of this section pursuant to the previous sentence, the provisions of subsection (a) of this section shall apply in any State or any political subdivision of a State which (i) the Attorney General determines maintained on November 1, 1968, any test or device, and with respect to which (ii) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1968, or that less than 50 per centum of such persons voted in the presidential election of November 1968. On and after August 6, 1975, in addition to any State or political subdivision of a State determined to be subject to

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[1] So in original. Probably should be "State".

subsection (a) of this section pursuant to the previous two sentences, the provisions of subsection (a) of this section shall apply in any State or any political subdivision of a State which (i) the Attorney General determines maintained on November 1, 1972, any test or device, and with respect to which (ii) the Director of the Census determines that less than 50 per centum of the citizens of voting age were registered on November 1, 1972, or that less than 50 per centum of such persons voted in the Presidential election of November 1972.

A determination or certification of the Attorney General or of the Director of the Census under this section or under section 1973d or 1973k of this title shall not be reviewable in any court and shall be effective upon publication in the Federal Register.

(c) "Test or device" defined

The phrase "test or device" shall mean any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class.

(d) Required frequency, continuation and probable recurrence of incidents of denial or abridgement to constitute forbidden use of tests or devices

For purposes of this section no State or political subdivision shall be determined to have engaged in the use of tests or devices for the purpose or with the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in subsection (f)(2) of this section if (1) incidents of such use have been few in number and have been promptly and effectively corrected by State or local action, (2) the continuing effect of such incidents has been eliminated, and (3) there is no reasonable probability of their recurrence in the future.

(e) Completion of requisite grade level of education in American-flag schools in which the predominant classroom language was other than English

(1) Congress hereby declares that to secure the rights under the fourteenth amendment of persons educated in American-flag schools in which the predominant classroom language was other than English, it is necessary to prohibit the States from conditioning the right to vote of such persons on ability to read, write, understand, or interpret any matter in the English language.

(2) No person who demonstrates that he has successfully completed the sixth primary grade in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English, shall be denied the right to

vote in any Federal, State, or local election because of his inability to read, write, understand, or interpret any matter in the English language, except that in States in which State law provides that a different level of education is presumptive of literacy, he shall demonstrate that he has successfully completed an equivalent level of education in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English.

(f) Congressional findings of voting discrimination against language minorities; prohibition of English-only elections; other remedial measures

(1) The Congress finds that voting discrimination against citizens of language minorities is pervasive and national in scope. Such minority citizens are from environments in which the dominant language is other than English. In addition they have been denied equal educational opportunities by State and local governments, resulting in severe disabilities and continuing illiteracy in the English language. The Congress further finds that, where State and local officials conduct elections only in English, language minority citizens are excluded from participating in the electoral process. In many areas of the country, this exclusion is aggravated by acts of physical, economic, and political intimidation. The Congress declares that, in order to enforce the guarantees of the fourteenth and fifteenth amendments to the United States Constitution, it is necessary to eliminate such discrimination by prohibiting English-only elections, and by prescribing other remedial devices.

(2) No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote because he is a member of a language minority group.

(3) In addition to the meaning given the term under subsection (c) of this section, the term "test or device" shall also mean any practice or requirement by which any State or political subdivision provided any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, only in the English language, where the Director of the Census determines that more than five per centum of the citizens of voting age residing in such State or political subdivision are members of a single language minority. With respect to subsection (b) of this section, the term "test or device", as defined in this subsection, shall be employed only in making the determinations under the third sentence of that subsection.

(4) Whenever any State or political subdivision subject to the prohibitions of the second sentence of subsection (a) of this section provides any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, it shall provide them in the language of the applicable language minority group as well as in the English language: *Provided*, That where the language of the applicable minority group is oral or unwritten or in the case of Alaskan Natives and American Indians, if the predominate language is historically unwritten, the State or political subdivision is only required to furnish oral

instructions, assistance, or other information relating to registration and voting.

§ 1973c. Alteration of voting qualifications and procedures; action by State or political subdivision for declaratory judgment of no denial or abridgement of voting rights; three-judge district court; appeal to Supreme Court

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does

not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with

the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

DEPARTMENT OF JUSTICE

Office of the Attorney General

DETERMINATION OF THE ATTORNEY GENERAL PURSUANT TO SECTION 4(b)(1) OF THE VOTING RIGHTS ACT OF 1965

In accordance with section 4(b)(1) of the Voting Rights Act of 1965 (Public Law 89-110). I have determined that each of the following States maintained on November 1, 1964, one or more tests or devices as defined in section 4(c) of the Act:

Alabama
Alaska
Arizona
California
Connecticut
Delaware
Georgia
Hawaii
Idaho
Louisiana
Maine
Massachusetts
Mississippi
New Hampshire
New York
North Carolina
Oregon
South Carolina
Virginia
Washington
Wyoming

NICHOLAS DEB. KATZENBACH,
Attorney General.

AUGUST 6, 1965.

[F.R. Doc. 65-8416; Filed, August 6, 1965 3:00 p.m.]

DEPARTMENT OF COMMERCE

Bureau of the Census

DETERMINATION OF THE DIRECTOR OF THE CENSUS PURSUANT TO SECTION 4(b)(2) OF THE VOTING RIGHTS ACT OF 1965 (PUBLIC LAW 89-110)

I have this date received a letter from the Attorney General advising me that he has determined that the

following States maintained on November 1, 1964, one or more tests or devices as defined in section 4(c) of the Act:

Alabama
Alaska
Arizona
California
Connecticut
Delaware
Georgia
Hawaii
Idaho
Louisiana
Maine
Massachusetts
Mississippi
New Hampshire
New York
North Carolina
Oregon
South Carolina
Virginia
Washington
Wyoming

In accordance with section 4(b)(2) of the Voting Rights Act of 1965 (Public Law 89-110), I have determined that in each of the following States less than 50 per centum of the persons of voting age residing therein voted in the presidential election of November 1964:

Alabama
Alaska
Georgia
Louisiana
Mississippi
South Carolina
Virginia

I have also determined that in each of the following political subdivisions considered as a separate unit less than 50 per centum of the persons of voting age residing therein voted in the presidential election of November 1964:

NORTH CAROLINA

Anson County
Bertie County
Caswell County
Chowan County
Craven County
Cumberland County
Edgecombe County
Franklin County
Gates County
Granville County
Greene County
Halifax County
Hertford County
Hoke County
Lenoir County
Nash County
Northampton County
Onslow County
Pasquotank County
Person County
Pitt County
Robeson County
Scotland County
Vance County
Wayne County
Wilson County

ARIZONA

Apache County

Current studies of other political subdivisions will be completed as soon as the relevant data are obtained and in accordance with the Voting Rights Act of 1965, I will make additional determinations for such political subdivisions in which less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or in which less than 50 per centum of such persons voted in the presidential election of November 1964.

A. ROSS ECKLER.

Director,
Bureau of the Census.

AUGUST 6, 1965.

[F.R. Doc. 65-8417; Filed, August 6, 1965 3:01 p.m.]

CONSTITUTION OF VIRGINIA

Art. II, § 6

§ 6. Apportionment. – Members of the House of Representatives of the United States and members of the Senate and of the House of Delegates of the General Assembly shall be elected from electoral districts established by the General Assembly. Every electoral district shall be composed of contiguous and compact territory and shall be so constituted as to give, as nearly as is practicable, representation in proportion to the population of the district. The General Assembly shall reapportion the Commonwealth into electoral districts in accordance with this section in the year 1971 and every ten years thereafter.

Any such reapportionment law shall take effect immediately and not be subject to the limitations contained in Article IV, Section 13, of this Constitution.

CHAPTER 6

An Act to amend the Code of Virginia by adding in Title 24.1 a chapter numbered 1.3, consisting of sections numbered 24.1-17.300 through 24.1-17.314, and to repeal §§ 24.1-4.3 and 24.1-5 of the Code of Virginia, relating to congressional districts in the Commonwealth.

[S 2003]

Approved December 11, 1991

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia is amended by adding in Title 24.1 a chapter numbered 1.3, consisting of sections numbered 24.1-17.300 through 24.1-17.314, as follows:

CHAPTER 1.3.
CONGRESSIONAL DISTRICTS OF VIRGINIA.

§ 24.1-17.300. Congressional districts. – There shall be eleven Virginia members of the United States House of Representatives elected from eleven congressional districts and each district is entitled to representation by one representative.

§ 24.1-17.301. First District. – The First Congressional District shall consist of the Counties of Accomack, Caroline, Gloucester, King George, Lancaster, Mathews, Middlesex, Northampton, Northumberland, Stafford, Westmoreland, and York; the Cities of Fredericksburg, Poquoson, and Williamsburg; the following Hanover County precincts: Ashcake, Ashland, Battlefield, Blunts, Courthouse, Elmont, Goddins Hill, Old Church, Rural Point, Stonewall Jackson, and Studley; the following James City County precincts: Berkeley, Jamestown A, Jamestown B, Powhatan, and Stonehouse; the following Spotsylvania County precincts: Battlefield, Brent's

Mill, Courthouse, Salem, and Summit; the following City of Hampton precincts: Booker, Burbank, Fox Hill, Kecoughtan, La Salle, Northampton, Phillips, and Tucker-Capps; the following City of Newport News precincts: Beaconsdale, Boulevard, Christopher Newport, Deer Park, Hilton, Jenkins, McIntosh, Palmer, Richneck, Saunders, Sedgefield, South Morrison, and Yates; a part of the Wilmington Parish Precinct of Hanover County; a part of the following Spotsylvania County precincts: Blaydes Corner and Travelers Rest; a part of the following City of Hampton precincts: Buckroe, Kraft, Phoebus, River, Tyler, and Wythe; and part of the following City of Newport News precincts: Charles, Deep Creek, Hidenwood, James Brandon, Reservoir, Riverside, Sanford, and Warwick.

§ 24.1-17.302. Second District. – The Second Congressional District shall consist of the following City of Norfolk precincts: Numbers 12, 13, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 26, 27, 32, 33, 34, 35, 38, 40, 41, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, and 55; the following City of Virginia Beach precincts: Alanton, Aragona, Arrowhead, Bayside, Bellamy, Blackwater, Bonney, Brandon, Cape Henry, Capps Shop, Chesapeake Beach, College Park, Courthouse, Creeds, Davis Corner, Fairfield, Great Neck, Green Run, Holland, Homestead, Kempsville, Kings Grant, Kingston, Lake Smith, Larkspur, Linkhorn, Little Neck, London Bridge, Lynnhaven, Magic Hollow, Malibu, Mount Trashmore, Oceana, Ocean Park, Old Donation, Pembroke, Plaza, Providence, Red Wing, Salem, Seatack, Shannon, Sigma, Stratford Chase, Thalia, Thoroughgood, Timberlake, Trantwood, Virginia Beach A, Virginia Beach B, Virginia Beach C, Windsor Oaks, Witchduck, Wolfsnare, and Woodstock; a part of Precinct Number 39 of the City of Norfolk; and a part of the Lake Christopher Precinct of the City of Virginia Beach.

§ 24.1-17.303. Third District. – The Third Congressional District shall consist of the Counties of Charles City, Essex, King and Queen, King William, New Kent, Richmond, and Surry; the following Henrico County precincts: Azalea, Brookland, Cedar Fork, Chamberlayne, Eanes, East Highland Park, Glen Echo, Glenwood, Highland Gardens, Montrose, Ratcliffe, and Sullivans; the Roberts Precinct of James City County; the following City of Hampton precincts: Aberdeen, Bassett, Cooper, Lee, Mallory, Pembroke, Phenix, and Smith; the following City of Newport News precincts: Briarfield, Carver, Chestnut, Denbigh, Downtown, Dunbar, Epes, Huntington, Jefferson, Lee, Magruder, Marshall, Nelson, Newmarket, Newsome Park, Reed, River, Washington, Wilson, and Zed-Fort Eustis; the following City of Norfolk precincts: Numbers 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 14, 28, 29, 30, 31, 36, 37, and 42; the following City of Petersburg precincts: Ward I-Precinct I, Ward I-Precinct 2, Ward IV-Precinct 2, Ward V-Precinct 1, Ward V-Precinct 2, Ward VI-Precinct 1, Ward VI-Precinct 2, and Ward VII-Precinct 1; the following City of Portsmouth precincts: Numbers 7, 9, 11, 13, 14, 20, 21, 26, 27, and 28; the following City of Richmond precincts: Numbers 301, 302, 303, 304, 305, 306, 307, 310, 403, 405, 406, 407, 501, 502, 503, 504, 505, 506, 507, 601, 602, 603, 604, 605, 606, 607, 608, 701, 702, 703, 704, 705, 706, 707, 801, 802, 803, 804, 805, 806, 807, 901, 902, 903, 904, 905, 906, and 907; a part of the following Henrico County precincts: Brook Hill, Glen Lea, Highland Springs, Longdale, Town Hall, and Whitlocks; a part of the following Prince George County precincts: Election District 1-Number 4 and Election District 2-Number 1; a part of the following City of Hampton precincts: Buckroe, Kraft, Phoebus, River, Tyler, and Wythe; a part of the Ward Two Precinct of the City of Hopewell; a part of the following City of Newport News

precincts: Charles, Deep Creek, Hidenwood, James Brandon, Reservoir, Riverside, Sanford, and Warwick; a part of the Number 39 Precinct of the City of Norfolk; a part of Ward IV-Precinct 1 of the City of Petersburg; a part of the following City of Portsmouth precincts: Numbers 10, 36, 37, and 38; a part of the following City of Richmond precincts: Numbers 203 and 404; and a part of the Yeates Precinct of the City of Suffolk.

§ 24.1-17.304. Fourth District. – The Fourth Congressional District shall consist of the Counties of Amelia, Brunswick, Dinwiddie, Goochland, Greensville, Isle of Wight, Louisa, Nottoway, Powhatan, Southampton, and Sussex; the Cities of Chesapeake, Colonial Heights, Emporia, and Franklin; the following Chesterfield County precincts: Beach, Ettrick, Harrowgate, Matoaca, and Winfree's Store; the following Prince George County precincts: Election District 1-Number 1, Election District 1-Number 2, Election District 1-Number 3, Election District 2-Number 2, and Election District 2-Number 3; the following City of Hopewell precincts: Ward One, Ward Three, Ward Four and Ward Five; the following City of Petersburg precincts: Ward II-Precinct 1, Ward II-Precinct 2, Ward III-Precinct 1, Ward III-Precinct 2, Ward IV-Precinct 3, and Ward VII-Precinct 2; the following City of Portsmouth precincts: Numbers 1, 5, 16, 17, 19, 22, 23, 24, 25, 29, 30, 31, 32, 33, 34, and 35; the following City of Suffolk Precincts: Airport, Booker T. Washington, Chuckatuck, Cypress Chapel, Driver, Eastover, Ebenezer, Hall Place, Holland, Holy Neck, John F. Kennedy No. 1, John F. Kennedy No. 2, Kilby's Mill, King's Fork, Lakeside, Riverview, and Whaleyville; a part of the following Chesterfield County precincts: Enon, Skinquarter, and Wells; a part of the following Prince George County precincts; Election District 1-Number 4 and

Election District 2-Number 1; a part of the Ward Two precinct of the City of Hopewell; a part of Ward IV-Precinct 1 of the City of Petersburg: a part of the following City of Portsmouth precincts: Number 10, 36, 37, and 38; a part of the Yeates Precinct of the City of Suffolk; and a part of the Lake Christopher Precinct of the City of Virginia Beach.

§ 24.1-17.305. Fifth District. – The Fifth Congressional District shall consist of the Counties of Appomattox, Buckingham, Campbell, Charlotte, Cumberland, Fluvanna, Franklin, Halifax, Henry, Lunenburg, Mecklenburg, Nelson, Patrick, Pittsylvania, and Prince Edward; the Cities of Bedford, Charlottesville, Danville, Martinsville, and South Boston; the following Albemarle County precincts: Batesville, Covesville, Crozet, Ivy, Keswick, Monticello, North Garden, Porter's, Scottsville, and Stony Point; the following Bedford County precincts: Big Island, Boonsboro, Bunker Hill, Cove, Forest, Goode, Huddleston, Kelso, Liberty High School, Montvale, Mountain View, New London, Otter Hill, Sedalia, Sign Rock, Staunton River, Thaxton, Walton's Store, and White House; a part of the Woodbrook Precinct of Albemarle County; and a part of the Shady Grove Precinct of Bedford County.

§ 24.1-17.306. Sixth District. – The Sixth Congressional District shall consist of the Counties of Alleghany, Amherst, Augusta, Bath, Botetourt, Highland, and Rockbridge; the Cities of Buena Vista, Clifton Forge, Covington, Harrisonburg, Lexington, Lynchburg, Roanoke, Salem, Staunton, and Waynesboro; the following Bedford County precincts: Chamblissburg, Hardy, Moneta, and Stewartsville; the following Roanoke County precincts: Bonsack, Botetourt Springs, Burlington, Castle Rock, Catawba, Cave Spring, Clearbrook, Cotton Hill, Garst Mill, Hollins, Hunting Hills, Lindenwood, Monterey, Mount Pleasant, Mount Vernon, Northside, North

Vinton, Oak Grove, Ogden, Penn Forest, Peters Creek, Plantation, Read Mountain, South Vinton, and Windsor Hills; the following Rockingham County precincts: Bergton, Bridgewater Number I, Bridgewater Number 2, Cootes, Dayton Number I, Dayton Number 2, Edom, Elkton Number I, Elkton Number 2, Grottoes, Keezletown, Massanetta Springs, McGaheysville, Melrose, Mill Creek, Mount Clinton, Mount Crawford, Ottobine, Port Republic, and Singers Glen; a part of the Shady Grove Precinct of Bedford County; a part of the Mason Valley Precinct of Roanoke County; and a part of the Broadway Precinct of Rockingham County.

§ 24.1-17.307. Seventh District. – The Seventh Congressional District shall consist of the Counties of Culpeper, Greene, Madison, and Orange; the following Albemarle County precincts: Berkeley, Free Bridge, Free Union, Hollymead, and Jack Jouett; the following Chesterfield County precincts: Bellwood, Belmont, Beulah, Bon Air, Chippenham, Courthouse, Cranbeck, Crestwood, Davis, Drewry's Bluff, Falling Creek, Genito, Greenfield, Harbour Pointe and Swift Creek, Huguenot, Manchester, Meadowbrook High School, Midlothian, North Chester, Pocahontas, Providence, Reams, Robious A, Robious B, Saint Luke, Salem Church, Salisbury, Shenandoah, Smoketree, South Chester, Sycamore, Tomahawk, Wagstaff, and Winterpock; the following Hanover County precincts: Beaverdam, Clays, Cold Harbor, Farrington, Montpelier, Rockville, and Village; the following Henrico County precincts: Bethlehem, Bloomingdale, Canterbury, Carver, Chickahominy, Crestview, Deep Run, Derbyshire, Forest Heights, Freeman, Gayton, Glen Allen, Glenside, Godwin, Greendale, Hermitage, Hilliard, Hungary, Laburnum, Lakeside, Longan, Maybeury, Monument Hills, Pemberton, Pinchbeck, Ridge, Ridgefield, Rollingwood, Sadler, Sandston, Seven

Pines, Short Pump, Skipwith, Spottswood, Staples Mill, Summit Court, Three Chopt, Tuckahoe, Tucker, West End, Westwood, Wilkinson, and Wistar; the following Spotsylvania County precincts: Belmont, Brokenburg, Grange Hall, Holbert Building, Maury, Partlow, and Todds Tavern; the following City of Richmond precincts: Numbers 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 201, 202, 204, 205, 206, 207, 208, 209, 308, 309, 401, and 402; a part of the Woodbrook Precinct of Albemarle County; a part of the following Chesterfield County precincts: Enon, Skinquarter, and Wells; a part of the Wilmington Parish Precinct of Hanover County; a part of the following Henrico County precincts: Brook Hill, Glen Lea, Highland Springs, Longdale, Town Hall, and Whitlocks; a part of the following Spotsylvania County precincts: Blaydes Corner and Travelers Rest; and a part of the following City of Richmond precincts: Numbers 203 and 404.

§ 24.1-17.308. Eighth District. – The Eighth Congressional District shall consist of Arlington County; the Cities of Alexandria and Falls Church; the following Fairfax County precincts: Belle Haven, Belleview, Bucknell, Bush Hill, Cameron, Cardinal, Chain Bridge, Chesterbrook, Churchill, Crestwood, Delong, El Nido, Fairfield, Forest, Fort Hunt, Franconia, Garfield, Groveton, Gunston, Haycock, Hayfield, Hollin Hall, Huntington, Irving, Keene Mill, Kirby, Kirkside, Langley, Longfellow, Lorton, Lynbrook, Marlan A, Marlan B, McLean, Mount Eagle, Newington, North Springfield Number 1, North Springfield Number 2, North Springfield Number 3, Orange, Pimmit, Pohick, Rose Hill, Salona, Saratoga, Sherwood, Stratford, Valley, Virginia Hills, Waynewood, Westgate, Westhampton, Westmoreland, Whitman, Woodlawn, and Woodley; and a part of the White Oaks Precinct of Fairfax County.

§ 24-17.309, Ninth District. – The Ninth Congressional District shall consist of the Counties of Bland, Buchanan, Carroll, Craig, Dickenson, Floyd, Giles, Grayson, Lee, Montgomery, Pulaski, Russell, Scott, Smyth, Tazewell, Washington, Wise, and Wythe; the Cities of Bristol, Galax, Norton, and Radford; the following Roanoke County precincts: Bent Mountain, Glenvar, Green Hill, and Poages Mill; and a part of the Mason Valley Precinct of Roanoke County.

§ 24.1-17.310. Tenth District. – The Tenth Congressional District shall consist of the Counties of Clarke, Fauquier, Frederick, Loudoun, Page, Rappahannock, Shenandoah, and Warren; the Cities of Manassas, Manassas Park, and Winchester; the following Fairfax County precincts: Chantilly, Clifton, Cooper, Cub Run, Forestville, Fox Mill, Franklin, Great Falls, Greenbriar East, Greenbriar West, Kenmore, Kinross, London Towne, Navy, Newgate, Oakton, Shouse, Sully, and Vale; the following Prince William County precincts: Armory, Brentsville, Buckhall, Bull Run, Catharpin, Coles, Evergreen, Haymarket, Henderson, Jackson, Linton Hall, Loch Lomond, McCoart, Nokesville, Parkside, Pattie, Sinclair, Stonewall, Sudley, Washington Reid, Westgate, and Woodbine; the following Rockingham County precincts: Tenth Legion and Timberville; a part of the Flint Hill Precinct of Fairfax County; and a part of the Broadway Precinct of Rockingham County.

§ 24.1-17.311. Eleventh District. – The Eleventh Congressional District shall consist of the City of Fairfax; the following Fairfax County precincts: Baileys, Barcroft, Belevedere, Blake, Bren Mar, Bristow, Brook Hill, Burke, Camelot, Chapel, Cherry Run, Clearview, Columbia, Dogwood, Edsall, Fairfax Station, Fairview, Fort Buffalo, Freedom Hill, Glade, Glen Forest, Graham, Greenway, Heritage, Herndon Number 1, Herndon Number 2, Herndon Number 3, Holmes, Hummer,

Hunters Woods, Hutchison, Kings Park, Lake Braddock, Laurel, Leehigh, Lincolnia, Little Run, Long Branch, Magarity, Mantua, Marshall, Masonville, Merrifield, Mosby, North Point, Nottoway, Oak Hill, Olley, Parklawn, Pine Ridge, Pine Spring, Pioneer, Poe, Price, Ravensworth, Ravenwood, Reston Number 1, Reston Number 2, Reston Number 3, Robinson, Saint Albans, Shreve, Sideburn, Signal Hill, Skyline, Sleepy Hollow, South Lakes, Stenwood, Sunrise Valley, Terra Centre, Terraset, Thoreau, Timber Lane, Tripps, Vienna Number 1, Vienna Number 2, Vienna Number 3, Vienna Number 4, Vienna Number 5, Vienna Number 6, Villa, Wakefield, Walker, Walnut Hill Number 1, Walnut Hill Number 2, Westbriar, Westlawn, Wayanoke, Whittier, Willston, Wolftrap, Woodburn, Woodson A, Woodson B, Woodyard, and including the Fairfax County governmental complex located within the City of Fairfax; the following Prince William County precincts: Bel Air, Belmont, Bethel, Civic Center, Dale, Dumfries, Enterprise, Featherstone, Godwin, Graham Park, Kerrydale, Kilby, King, Lake Ridge, Library, Lynn, Minnieville, Neabsco, Occoquan, Old Bridge, Potomac, Potomac View, Quantico, Rippon, Rockledge, Saunders, Springwoods, and Tall Oaks; and a part of the following Fairfax County precincts: Flint Hill and White Oaks.

§ 24.1-17.312. Boundaries of political subdivisions and precincts. – All references to boundaries of political subdivisions and precincts shall be interpreted to refer to those in existence on April 1, 1991, and as reported by the United States Bureau of the Census in census reports provided pursuant to P. L. 94-171, notwithstanding subsequent boundary changes by law, annexation, merger, consolidation, or the voiding of boundary changes theretofore made final.

§ 24.1-17.313. Parts of precincts. – Parts of precincts listed in this chapter are described by reference to United

States Census blocks as contained in the Statistical Report for Senate Bill Number 2003 on file with the Clerk of the Senate of Virginia.

§ 24.1-17.314. Severability. – If any provision of this chapter or the application thereof to any person or circumstance is held invalid, the invalidity shall not affect the other provisions or applications of this chapter which can be given effect without the invalid provisions or application, and to this end the provisions of this chapter are severable.

2. That §§ 24.1-4.3 and 24.1-5 of the Code of Virginia are repealed.

CERTIFICATION OF THE ACTS OF ASSEMBLY

1991 SPECIAL SESSION II

I, Bruce F. Jamerson, Clerk of the House of Delegates of Virginia, do hereby certify that the 1991 Special Session II of the General Assembly of the Commonwealth of Virginia at which the Acts of Assembly herein printed were enacted, convened on November 18, 1991, and adjourned sine die on January 8, 1992.

BRUCE F. JAMERSON
Clerk of the House of Delegates
and
Keeper of the Rolls of the State

Note: All Acts of the 1991 Special Session II of the General Assembly, relating to reapportionment or with emergency clauses, become effective when approved by the Governor. All other Acts become effective as provided therein or at the first moment of May 1, 1992.

CHAPTER 983

An Act to amend and reenact §§ 24.1-17.301, 24.1-17.303, and 24.1-17.313 of the Code of Virginia, relating to congressional districts.

[S 894]

Approved April 7, 1993

Be it enacted by the General Assembly of Virginia:

1. That §§ 24.1-17.301, 24.1-17.303, and 24.1-17.313 of the Code of Virginia are amended and reenacted as follows:

§ 24.1-17.301. First District – The First Congressional District shall consist of the Counties of Accomack, Caroline, Gloucester, *James City*, King George, Lancaster, Mathews, Middlesex, Northampton, Northumberland, *Richmond*, Stafford, Westmoreland, and York; the Cities of Fredericksburg, Poquoson, and Williamsburg; the following Hanover County precincts: Ashcake, Ashland, Battlefield, Blunts, Courthouse, Goddins Hill, Old Church, Rural Point, Stonewall Jackson, Studley, and Wilmington Parish; ~~the following James City County precincts: Berkeley, Jamestown A, Powhatan, and Stonehouse;~~ the following Spotsylvania County precincts: Battlefield, Brent's Mill, Salem, Summit, and Travelers Rest; the following City of Hampton precincts: Booker, Burbank, Fox Hill, Kecoughtan, La Salle, Northampton, Phillips, and Tucker-Capps; the following City of Newport News precincts: Beaconsdale, Boulevard, Christopher Newport, Deer Park, Hilton, Jenkins, ~~McIntosh,~~ Palmer, Richneck, Saunders, Sedgefield, South Morrison, and Yates; a part of the Elmont Precinct of Hanover County; ~~a part of the Roberts Precinct of James City County;~~ a part of the Courthouse Precinct of Spotsylvania County; a part of the

following City of Hampton precincts: Buckroe, Kraft, Phoebus, River, Tyler, and Wythe; and part of the following City of Newport News precincts: Charles, Deep Creek, Hidenwood, James Brandon, ~~Reservoir,~~ Riverside, Sanford, and Warwick.

§ 24.1-17.303. Third District. – The Third Congressional District shall consist of the Counties of Charles City, Essex, King and Queen, King William, New Kent, ~~Richmond,~~ and Surry; the following Henrico County precincts: Azalea, Brookland, Cedar Fork, Chamberlayne, Eanes, East Highland Park, Glen Echo, Glenwood, Highland Gardens, Montrose, and Ratcliffe; ~~the Jamestown B Precinct of James City County;~~ the following City of Hampton precincts: Aberdeen, Bassett, Cooper, Lee, Mallory, Pembroke, Phenix, and Smith; the following City of Newport News precincts: Briarfield, Carver, Chestnut, Denbigh, Downtown, Dunbar, Epes, Huntington, Jefferson, Lee, Magruder, Marshall, *McIntosh,* Nelson, Newmarket, Newsome Park, Reed, *Reservoir,* River, Washington, Wilson, and Zed-Fort Eustis; the following City of Norfolk precincts: Numbers 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 14, 28, 29, 30, 31, 36, 37, and 42; the following City of Petersburg precincts: Ward I-Precinct 1, Ward I-Precinct 2, Ward IV-Precinct 2, Ward V-Precinct 1, Ward V-Precinct 2, Ward VI-Precinct 1, Ward VI-Precinct 2, and Ward VII-Precinct 1; the following City of Portsmouth precincts: Numbers 7, 9, 11, 13, 14, 20, 21, 26, 27, and 28; the following City of Richmond precincts: Numbers 301, 302, 303, 304, 305, 306, 307, 310, 403, 405, 406, 407, 501, 503, 504, 505, 506, 507, 601, 602, 603, 604, 605, 606, 607, 608, 701, 702, 703, 704, 705, 706, 707, 801, 802, 803, 804, 805, 806, 807, 901, 902, 903, 904, 905, 906, and 907; a part

of the following Henrico County precincts: Brook Hill, Glen Lea, Highland Springs, Longdale, Sullivans, Town Hall and Whitlocks; ~~a part of the Roberts Precinct of James City County;~~ a part of the following Prince George County precincts: Election District 1-Number 4 and Election District 2-Number 1; a part of the following City of Hampton precincts: Buckroe, Kraft, Phoebus, River, Tyler, and Wythe; a part of the Ward Two Precinct of the City of Hopewell; a part of the following City of Newport News precincts: Charles, Deep Creek, Hidenwood, James Brandon, ~~Reservoir,~~ Riverside, Sanford, and Warwick; a part of the following City of Norfolk precincts: 13, 39, and 44; a part of Ward IV-Precinct 1 of the City of Petersburg; a part of the following City of Portsmouth precincts: Numbers 10, 36, 37, and 38; a part of the following City of Richmond precincts: Numbers 203, 404, and 502; and a part of the Yeates Precinct of the City of Suffolk.

§ 24.1-17.313. Parts of precincts. – Parts of precincts listed in this chapter are described by reference to United States Census blocks as contained in the Statistical Report (~~C0786555~~ *C0830452*) for Chapter 1.3 (§ 24.1-17.300 et seq.) of this title filed with the Clerk of the Senate of Virginia to implement the provisions of this chapter. However, that part of Timberville Precinct of Rockingham County included in the Sixth District shall be only that part of the 1990 census precinct situated within the corporate limits of the Town of Broadway as of January 1, 1992. That part of Timberville Precinct not within such 1992 corporate limits shall be included in the Tenth District.

2. That the effect of the first enactment shall be to include the entire Counties of James City and Richmond in the First Congressional District, except that the portion

of the James River in James City County which is contained in census blocks 080198599 and 080198699 shall be in the Third Congressional District; to include the entire 1990 Census precincts of McIntosh and Reservoir of the City of Newport News in the Third Congressional District; to include an additional part of the 1990 Census River Precinct of the City of Hampton bounded by Lincoln Street on the south, Eaton Street on the west, and Pembroke Avenue on the north in the First Congressional District; to include an additional part of the 1990 Census Phoebus Precinct of the City of Hampton contained within a line beginning at the intersection of South Mallory Street and East Howard Street, then southeast on South Howard Street, northeast on South Hope Street, southeast on East County Street, northeast on North Curry Street, northwest on Hopkins Street, northeast on North Hope Street, northwest on Sewell Avenue, and southwest on North Mallory Street and then South Mallory Street to East Howard Street, in the Third Congressional District; and to include the part of the 1990 Census Sanford Precinct of the City of Newport News situated south of Warwick Boulevard in the First Congressional District and the part situated north of Warwick Boulevard in the Third Congressional District.

SUMMARY OF ADJUSTMENTS IN PLAN C0723750

A. RICHMOND AND HENRICO IN TWO DISTRICTS

RESULT OF ADJUSTMENTS

1. Richmond City and Henrico County each is divided between only two, rather than three, districts. These are Districts 3 and 7.

2. Districts 1, 7, and 10 are affected.

3. Minor adjustments are made in District 3 to (a) move part of Richmond Precinct 203 (883 population shift) from District 7 to District 3 and (b) widen the link from Charles City County to Richmond City through eastern Henrico County.

4. Congressmen Bliley and Allen remain paired in District 7.

5. All District 7 territory is east of the Blue Ridge.

6. Splits one new locality (Spotsylvania), reunites one county (Rappahannock).

DESCRIPTION OF CHANGES

1. Richmond and Henrico are reduced to two districts by shifting all population in District 1 (adopted plan) to District 7.

   The population shifted is: Richmond – 46,863 and Henrico – 51,796.

2. An additional 16,954 Hanover County population is shifted from District 1 to District 7.

3. Part of Richmond Precinct 203 (883 population) is shifted to District 3, offsetting small splits in Henrico Brook Hill and Glen Lea Precincts used to link eastern and western Henrico in District 7.

4. Stafford (61,236) is shifted from District 10 to District 1. Fredericksburg (19,027) and part of Spotsylvania (35,525) shift from District 7 to District 1. The total of 115, 788 shifted to District 1 offsets the Richmond, Henrico, and Hanover shifts from District 1 to District 7.

5. The 61,326 lost in District 10 by shifting Stafford is made up by shifting the area west of the Blue Ridge in District 7 of the adopted plan to District 10.

Shenandoah	31,636
Page	21,690
Rockingham (part)	6,465
Rappahannock (part)	1,428
Total	61,219

B. NEWPORT NEWS IN TWO DISTRICTS

RESULT OF ADJUSTMENTS

1. Newport News divided between only two, rather than three, districts. These are Districts 1 and 3. The Fort Eustis area is shifted from District 4 to District 3.

2. Districts 2, 3, and 4 are affected.

3. The black majority in District 3 is increased slightly.

4. Virginia Beach is divided between Districts 2 and 3.

DESCRIPTION OF CHANGES

1. Shift Fort Eustis from District 4 into District 3 so that Newport News is wholly contained in Districts 1 and 3. Fort Eustis is 9,967 (3,350 – 33.61% black).

2. Shift Norfolk population from District 3 to District 2 to offset addition of Fort Eustis to District 3. Move whiter Norfolk precincts from District 3 to District 2. This change also relates to section C below which lists

the Norfolk precincts moved from District 3 to District 2.

3. Shift part of Virginia Beach (part of Lake Christopher Precinct) from District 2 to District 4 to complete the circle and move 9,941 population back into District 4.

C. INCREASE THE BLACK POPULATION PERCENTAGE IN DISTRICT 3

RESULT OF ADJUSTMENTS

1. Increase black percentage of total population from 61.48% to 63.98%. Increase black percentage of voting age population from 58.50% to 61.17%.

2. Affects Districts 2 and 3.

3. Relates to change B above which also increases these percentages.

DESCRIPTION OF CHANGES

1. Shifts predominantly black Norfolk precincts to District 3 from District 2. These are Precincts 4, 28, 29, 39 (part) and 42. The population is 28,525 (72.50% black).

2. Shifts predominantly white Norfolk precincts to District 2 from District 3. These are Precincts 16, 27, 32, 34, 35, 38, 40, 41, 46, and 47. The population is 38,539 (25.93% black). The extra 10,000 population in this group of precincts is shifted to District 2 from District 3 because of the Fort Eustis change described in section B above.

D. CONTIGUITY OF DISTRICTS

RESULT OF ADJUSTMENTS AND DESCRIPTION OF CHANGES

1. Shifts the single resident of Chesterfield (Enon Precinct) in District 3 to District 7. Chesterfield is divided only between Districts 4 and 7.

2. Links the Hopewell and Petersburg parts of District 3 to the District by Route 156 from Charles City County to part of Prince George County.

3. Replaces the part of Prince George County shifted to District 3 from District 4 with parts of Hopewell and Petersburg.

4. Provides a link between Newport News and the Portsmouth and Norfolk parts of District 3 via Interstate 664 from Newport News to Suffolk (Yeatts Precinct). Continues the land connection through parts of Portsmouth Precincts 37 and 38.

5. Shifts Portsmouth Precinct 1 and parts of Precincts 16 and 17 to District 4 to replace the District 4 territory used to provide the land connection.

6. Eliminates the splitting of Norfolk Precincts 17, 18, and 19 by adding back the water blocks used under the enrolled bill Plan C0705552 to link the parts of District 3.

7. Prince George County and Suffolk are split and were not split in the enrolled bill. Chesterfield is placed in two rather than three districts.

E. FAIRFAX COUNTY

Under the Saslaw floor amendment affecting the line between Districts 8 and 11, Pioneer Precinct was shifted

to District 11 to balance the population. This plan places Pioneer in District 11.

Plan C0727750 further refines the line to eliminate the +341 and -320 deviations in Districts 8 and 11 by splitting White Oaks Precinct between Districts 8 and 11 and refining the split in Flint Hill Precinct between Districts 10 and 11.

DLS/mrs
11/27/91

Congressional Redistricting
Governor's Amendments
12/2/91 C0723750

0016 32

Tue Nov 26 23:24:02 1991 PLAN SUMMARY for Plan C0723750

PLAN POPULATION SUMMARY TOTALS (VOTING AGE AND TOTAL POPULATION BY RACE)

TOTAL POPULATION	WHITE	%	BLACK	%	OTHER	%	VOTING AGE POPULATION	WHITE	%	BLACK	%	OTHER	%
6187358	4791739	77.44	1162994	18.80	232625	3.76	4682620	3693412	78.87	823250	17.58	165958	3.54

STATEWIDE POPULATION = 6187358
IDEAL DISTRICT POPULATION = 562487

RELATIVE DEVIATION RANGE % : 0.00 to 0.00
AVERAGE RELATIVE DEVIATION % : 0.00
MEDIAN RELATIVE DEVIATION % : 0.00

BLACK MAJORITY DISTRICTS (DISTRICTS WITH 50% OR HIGHER TOTAL BLACK POPULATION)

DISTRICT	PERCENT BLACK TOTAL POPULATION	PERCENT BLACK VOTING AGE POPULATION
3	63.98	61.17

Tue Nov 26 23:24:10 1991 DISTRICT POPULATION ANALYSIS for Plan C0723750
VOTING AGE AND TOTAL POPULATION BY RACE

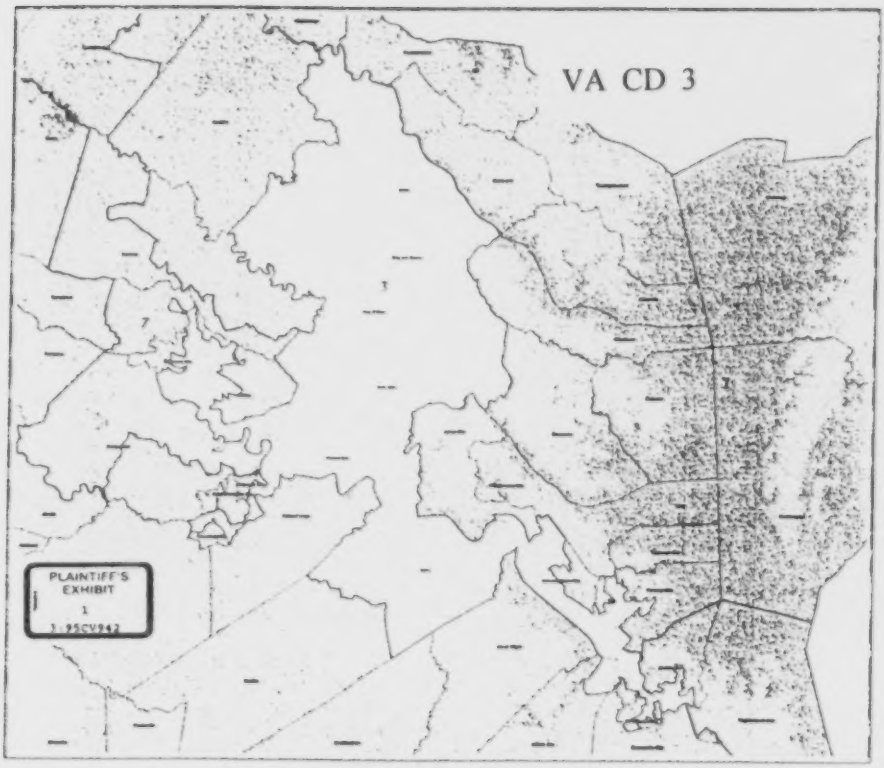
DISTRICT	TOTAL POPULATION	RELATIVE DEVIATION%	ABSOLUTE DEVIATION	WHITE	%	BLACK	%	OTHER	%	VOTING AGE POP.	WHITE	%	BLACK	%	OTHER	%
1	562480	0.00	-7	449583	79.93	101117	17.98	11780	2.09	418548	339750	81.17	70626	16.87	8172	1.95
2	562490	0.00	3	439332	78.10	93605	16.64	29553	5.25	419405	333573	79.53	65062	15.51	20770	4.95
3	562474	0.00	-13	191053	33.97	359897	63.98	11524	2.05	414466	152782	36.86	253523	61.17	8161	1.97
4	562469	0.00	-18	372266	66.18	180479	32.09	9724	1.73	415009	291148	67.75	127243	30.66	6618	1.59
5	562493	0.00	6	419646	74.60	138987	24.71	3860	0.69	431689	330180	76.49	98696	22.86	2813	0.65
6	562492	0.00	5	492522	87.56	64641	11.49	5329	0.95	437876	387676	88.54	46499	10.62	3701	0.85
7	562502	0.00	15	492638	87.58	56677	10.08	13187	2.34	426438	376980	88.40	40274	9.44	9184	2.15
8	562459	0.00	-28	427545	76.01	75135	13.36	59779	10.63	453691	352899	77.78	56587	12.47	44205	9.74
9	562482	0.00	-5	543199	96.57	13950	2.48	5333	0.95	434035	419346	96.62	10485	2.42	4204	0.97
10	562508	0.00	21	510139	90.69	32483	5.77	19886	3.54	411714	375101	91.11	22939	5.57	13674	3.32
11	562509	0.00	22	453816	80.68	46023	8.18	62670	11.14	419749	343977	81.95	31316	7.46	44456	10.59
Total	6187358			4791739	77.44	1162994	18.80	232625	3.76	4682620	3693412	78.87	823250	17.58	165958	3.54

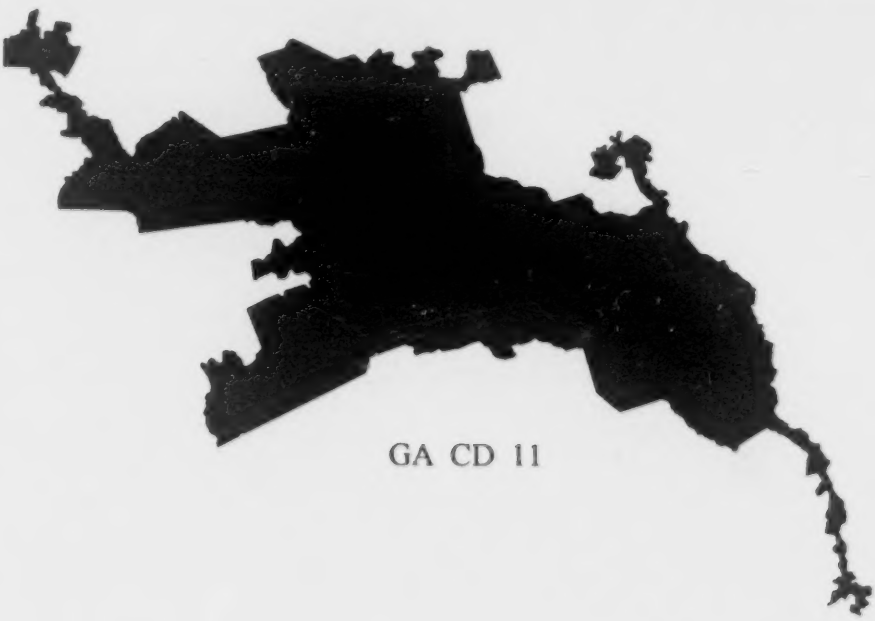
SOURCE: U.S. DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS P.L. 94-171 DATA

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C0605101 - Senator Hunter Andrews Three District Plan with minority district (60.35% Black POP; 57.05% Black VAP)





GA CD 11

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LA CD 4 (103th Congress)
TX CD 30

TABLE 1 - Contests 1985 - 1991

In Which Black Candidates of Choice Competed
In Congressional, Statewide, and State Legislative Contests
In Majority White Districts In And Around Third District

YEAR	CONTEST	NAME OF CANDIDATE OF CHOICE	WIN/LOSS	VOTING POLARIZED/ DEGREE OF CROSS-OVER
1985	Lt. Governor	Wilder	Win	Yes (23.17% in CD 3)
1986	CD 1	Scott	Loss	Yes (7.88%)
1987	State Senate 2	Scott	Win	Yes (26.19%)
1987*	State Senate 1	Rice	Loss	Yes (22.38%)
1989**	State House 94	Harris	Loss	Yes (1.12%)
1989	State House 78	Bazemore	Loss	Yes (10.6%)
1989	Governor	Wilder	Win	Yes (26.12% in CD 3)
Average Cross-over				16.67% (19.39% without 1989 House 94)

* May not have been candidate of choice, but probably was
** Cross-over estimates unreliable but indicative of very low white cross-over for black candidate; may not have been candidate of choice

- **Compiled from P.E. 22, pp. 102-04; P.E. 19; D.E. 4.**
- **Degree of Cross-Over based upon Dr. Handley's weighted, bi-variate regression analysis.**

TABLE 2 - State Contests 1985 - 1991

In Which Black Candidates of Choice Competed and Lost in Majority Black State Legislative Districts Due to White Block Voting In and Around Third District

YEAR	CONTEST	NAME	VOTING POLARIZED/ DEGREE OF CROSS-OVER
1985	House 92 Primary	Jefferson	Primary returns not available, but probably yes
1991	House 69 Primary	McEachin	Primary returns not available, but probably yes
1991	House 75 Primary	Talton-Harris	Primary returns not available, but probably yes
1991	House 63 Primary	Preston	Primary returns not available, but probably yes
1991*	House 77 General	Bazemore	Yes (-4.51%)

* Cross-over estimate unreliable, but indicative of very low white cross-over for black candidate of choice.

- **1985 Contest identified in P.E. 19; J.E. 2075-76**
- **1991 Primary contests identified in J.E. 2341-47**
- **1991 House 77 identified in P.E. 19; P.E. 22, "Table 22"; D.E. 4.**
- **Degree of Cross-Over based upon Dr. Handley's weighted, bi-variate regression analysis.**

FILED
MAY 27 1997
OFFICE OF THE CLERK

No. 96-1779

In The

Supreme Court of the United States

October Term, 1996

M. BRUCE MEADOWS, SECRETARY
OF THE BOARD OF ELECTIONS,

Appellant,

v.

DONALD MOON, ET AL.,

Appellees.

On Appeal From The United States District Court
For The Eastern District Of Virginia

MOTION TO AFFIRM

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QUESTIONS PRESENTED

1. Whether the District Court properly invoked strict scrutiny, having found that in creating the Third Congressional District of the Commonwealth of Virginia, racial considerations predominated in a manner that subordinated other traditional race-neutral districting principles?

2. Whether the District Court properly found that the Commonwealth of Virginia lacked a strong basis in evidence to believe that the failure to create the Third Congressional District would be violative of Section 2 of the Voting Rights Act?

3. Whether the District Court properly found that the racial construction of the Third Congressional District was not narrowly tailored to remedy Virginia's alleged Section 2 liability?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the United States District Court were:

1. Donald Moon, appellee herein.
2. Robert Smith, appellee herein.
3. M. Bruce Meadows, in his official capacity as Secretary of the State Board of Elections, appellant herein.
4. Curtis W. Harris, Defendant-Intervenor, appellant herein.
5. Jayne W. Barnard, Defendant-Intervenor, appellant herein.
6. Jean Patterson Boone, Defendant-Intervenor, appellant herein.
7. Raymond H. Boone, Defendant-Intervenor, appellant herein.
8. Willie J. Dell, Defendant-Intervenor, appellant herein.
9. Henry C. Garrard, Sr., Defendant-Intervenor, appellant herein.
10. Walter J. Kenney, Sr., Defendant-Intervenor, appellant herein.
11. Melvin R. Simpson, Defendant-Intervenor, appellant herein.
12. Gerald T. Zerkin, Defendant-Intervenor, appellant herein.

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MOTION TO AFFIRM

Pursuant to Rule 18.6, Appellees respectfully urge that the Court affirm the judgment below which invalidates that portion of Va. Code § 24.2-302, establishing the electoral boundaries of the Third Congressional District. A unanimous panel found that Virginia, in creating District 3, unconstitutionally segregated voters according to their race by "creating a bizarre shaped district for the predominant purpose of bringing within its boundaries a population that was in excess of 63% black." *Moon v. Meadows*, 952 F. Supp. 1141, 1148 (E.D. Va. 1997). The factual underpinnings of the lower court's holding are overwhelmingly supported by the evidence. In sum, the record and well-reasoned opinion below is consistent with recent jurisprudence enforcing the Equal Protection Clause of the 14th Amendment, and warrants summary affirmance under *Shaw v. Reno*, 509 U.S. 603 (1993) ("Shaw I"), *Miller v. Johnson*, 115 S. Ct. 2475 (1995), *Bush v. Vera*, 116 S. Ct. 1941 (1996), and *Shaw v. Hunt*, 116 S. Ct. 1894 (1996) ("Shaw II").

STATEMENT OF THE CASE

The district at issue here is another bizarrely shaped, non-compact, excessively racial minority district created after the 1990 decennial census. Plaintiffs are grass-roots political activists who reside in the district and have standing to challenge this district. *United States v. Hays*, 115 S. Ct. 2431 (1995).

A. Background of Appellees' Challenge to Virginia's Third Congressional District

Virginians have made great progress ensuring African-American voters and candidates fair access to the political process. This includes the historic statewide election of L. Douglas Wilder, an African-American candidate, and candidate of choice of black voters, in a state with an African-American population of less than 19% as Lieutenant Governor in 1985, and then, in 1989, as Governor.

Based upon elections in Southeast Virginia[1] (the area affected by District 3) for Congressional or statewide office, African-American candidates of choice, including both former Governor Wilder and Congressman Robert C. Scott, received substantial white cross-over votes. In both of Governor Wilder's statewide elections, he received sufficient white cross-over votes that, had the election been held only in the four circa 1980 congressional districts of Southeast Virginia (districts 1, 2, 3, and 4), Governor Wilder would have won the election. Plaintiffs' Trial Exhibit "P.E." 22, pp. 74-81. In more recent elections, the pattern of white support for African-American candidates of choice is even more pronounced, as is shown in the elections of Rep. Scott. He received 44.9% of the white vote in 1992 and 49.3% of the white vote in 1994, while sailing to a 79% victory district-wide. Congressman Scott received a greater percentage of the white vote in District 3, in each of his elections, than did certain

---

[1] The challenged District 3 invades three historically distinct regions of Virginia: the Tidewater, Central Virginia, and Southside Virginia.

white candidates of choice of African-American voters including President Bill Clinton in 1992 and Senator Charles Robb in 1994. P.E. 22, p. 94.

This pattern of substantial white cross-over voting continues down the ballot to contests for local office, where candidates of choice of African-Americans are elected more often than they are defeated, with white cross-over reaching as high as 79.8% for an African-American Delegate seeking re-election in 1993[2]. P.E. 22, p. 104. Although, the record indicates that the Commonwealth undertook no effort to determine relative levels of racially polarized voting, Dr. Weber found that in 19 of 23 legislative contests in Southeastern Virginia, the candidate of choice of African-Americans was successful. P.E. 22, pp. 102, 104.

B. Development of Virginia's Redistricting Plan

Virginia's population increased 15.9% between the 1980 and 1990 Census. As a result of its comparative growth, Virginia was apportioned eleven Congressional Representatives, an increase of one over the previous decade. Population shifts around the state also required a new districting plan. The process of drawing new districts was undertaken by the General Assembly in the fall of 1991.

---

[2] The court credited the testimony of Dr. Ronald E. Weber, who conducted a comprehensive bivariate ecological regression analysis to determine levels of white cross-over voting for African-American candidates of choice, and determined that more often than not candidates of choice of African-Americans win. P.E. 22, pp. 102, 104.

Virginia had already developed new districting plans for its House of Delegates and Senate by the time the Assembly gathered to adopt a new congressional plan. Early in the year, the General Assembly adopted the following hierarchy of factors to be considered in redistricting: (1) equal population, (2) voting rights act – minority voting rights, (3) contiguity, compactness, partisan fairness, and other permissible considerations. Joint Trial Exhibits "J.E." 1501 – 1503, Jurisdictional Statement (J.S.) 3, 12 – 13. The State now attempts to excuse its racial gerrymander because it was under pressure from African-American interest groups and that the position of the Department of Justice was well known. P.E. 28, J.E. 1075-1076.

In a special session in November, 1991, the legislature turned to congressional redistricting. The Assembly considered ten congressional plans, all of which included a district with an African-American total population of greater than 60%, and seven of which included an African-American total population in excess of 65%. *Moon*, at 1144, Jurisdictional Statement Appendix "J.S. App." 6.

In order to attain such high percentages of minority voters in all of the proposed plans, the drafters disregarded Virginia's historical respect for regions, and city and county boundaries. This racially myopic approach was a significant departure from traditional districting principles. Virginia had asserted, strongly and repeatedly, in response to past voting rights lawsuits, that it was unwilling to divide independent cities and counties to create districts, even to satisfy the constitutional principle of one-person, one-vote. *See Mann v. Davis*, 213 F. Supp. 577 (E.D. Va. 1962), *Howell v. Mahan*, 330 F. Supp. 1138

(E.D. Va. 1971), *Cosner v. Dalton*, 522 F. Supp. 350 (E.D. Va. 1981), *Cline v. Robb*, 548 F. Supp. 128 (E.D. Va. 1982). Virginia's 1991 congressional plan, however, divided 21 independent cities and counties with more than half of those splits occurring in the tortured Third District. Prior to 1965, Virginia had never split any city or county to create congressional districts, and in the congressional districts of the 1980s, only four counties and one independent city had been divided. P.E. 10. The current plan also divides precincts for the first time in Virginia's history. Where previously no precincts were split, in 1991, 54 precincts are divided between congressional districts, 37 of which were within the Third District. *Moon*, at 1148, J.S. App. 18. The splitting of cities and precincts was the means by which the Commonwealth gathered African-Americans into District 3 and excluded neighboring white voters, so that African-Americans would comprise a majority in excess of 60% of the population.

In the 1990s, Virginia used a new computer mapping application, the CAM/CAR system, to redistrict at the census block level – a level where the **only** accurate data available to the redistricters was racial characteristics and population. J.E. 2844-2848. Although the CAM/CAR system could accommodate other demographic data layers at the census block level, the legislature chose to depict only race. J.E. 1503, 2831-2835, 2864-2865, 2871-2872. Contrary to the assertion of Appellant (Jurisdictional Statement "J.S." 3), because all of the votes of a single precinct are counted together, without attributing the votes to individual census blocks, reliable political data was not available at the census block level, or below the precinct level at all. By the state's own choice, however, race was.

On November 20, 1991, the General Assembly adopted a districting plan in which the African-American population of District 3 was 61.48%. The Governor promptly rejected that plan and proposed amendments which increased the African-American population in District 3 to 63.98%. This plan was adopted by the legislature in December, 1991, and was precleared by the Department of Justice in February, 1992.

The Commonwealth expressly admitted in its 1991 § 5 submission that "the major reason for the changes in this region, other than to meet population standards, was the establishment of a district with black majority total (63.98%) and voting age (61.17%) populations." J.E. 20. Accordingly, the Commonwealth reported that only the doctrine of one-person, one-vote overrode racial considerations in the creation of District 3. J.S. 3.

The Commonwealth intentionally sought out pockets of African-American voters throughout Southeastern Virginia, as it noted in Attachment 4 of the 1991 § 5 submission:

> [N]ew district 3 was created from predominantly black portions of four of Virginia's present congressional districts: 1, 2, 3, and 4. . . . Moving black population into new district 3 unavoidably reduced the black total and voting age population in surrounding congressional districts.

J.E. 27. App. 13.

The trial court observed that the Commonwealth, in its own description of the district in its § 5 preclearance materials, "omitted any reference that the traditional race-neutral criteria such as compactness, contiguity,

adherence to political subdivision boundaries, or the preservation of interest were considered in the redistricting process." *Id.* at 1145, J.S. App. 11.

Subsequently, the Commonwealth enacted two sets of technical amendments to the plan, which were undertaken with one sacrosanct admonition insofar as it affected the 3rd Congressional District: no amendment would be permitted if it "reduce[d] the black percentage of total and voting age population in the majority black district (district 3)." J.E. 1637.

C. Description of District 3

District 3 contains the predominantly African-American neighborhoods of essentially every city which was split by the district. "Except for the City of Suffolk, every one of the cities split by this district results in the black population being concentrated in the portion placed in the Third District." *Moon*, at 1147, J.S. App. 16. While there are a few whole counties in the district, together they only account for approximately 10% of the total population. P.E. 9. The Court observed that

> Every one of the fingers which reaches from the whole-county hub of the district, into the divided cities, uses lightly populated territory, barren stretches of river, or other dubious connectors such as highway exits which appear to be leading the wrong way in an effort to reach the black populations which it excises from the various cities.

Id. at 1147, J.S. App. 16.

D. Judgment of the District Court

Plaintiffs' constitutional challenge to District 3 was filed on November 16, 1995.[3] The case was tried before a three-judge panel on September 11 – 12, 1996. The Court, after reviewing the voluminous record, concluded that, "The evidence, in our view is **overwhelming** that the creation of a safe black district predominated in the drawing of the boundaries of the Third Congressional District." *Id.* at 1145, J.S. App. 10 (emphasis added). The Court based its conclusion of the Commonwealth's predominant racial purpose on the "evidence of legislative intent, the bizarre shape of the district, and the subordination of traditional districting principles". *Id.* at 1146, J.S. App. 11.

The Court rejected Virginia's alternate arguments, including that the legislature's purpose was to protect senior congressional incumbents and to keep military installations in separate districts, recognizing instead that race was the criterion that could not be compromised, noting:

> the Legislature's general disregard for keeping regions and localities intact, and its abandonment of compactness illustrate that traditional principles were subordinated to the principal reason for the makeup of District 3. Thus, whenever a non-racial adjustment was made, an adjustment elsewhere was made on the basis of race to maintain the district's racial composition.

Id. at 1148, J.S. App. 17.

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[3] The District Court permitted the intervention of nine Defendant-Intervenors represented by the American Civil Liberties Union and the National Association for the Advancement of Colored People ("Harris Intervenors").

Applying strict scrutiny, the Court rejected the Commonwealth's assertion that the district was necessary to avoid § 2 liability. *Id.* at 1149, J.S. App. 20. Likewise, the Court rejected the Harris Intervenors' assertion that § 2 claims against scattered local governments, many of which were settled without admission of liability, justified the Commonwealth's enactment of District 3 as a constitutionally compelling remedial district. *Id.*, at 1149, J.S. App. 21.

Finally the Court, relying on the testimony of Dr. Weber, found that the "Defendants have failed to prove the third prong of *Gingles*, and the proof of the first is doubtful at best." *Ibid.*

Summarizing its holding, the Court found that "the Commonwealth has failed to prove that District 3 satisfies a compelling state interest or that it is narrowly tailored." *Moon*, at 1150, J.S. App. 24.

The Commonwealth's notice of appeal was filed March 7, 1997 and its Jurisdictional Statement was mailed on May 6, 1997. The Defendant-Intervenors filed their notice of appeal with the District Court on March 10, 1997, and then sought a 21-day extension of time for the filing of their Jurisdictional Statement. An extension, until May 30, 1997, was granted by the Supreme Court on May 2, 1997. This Court has jurisdiction under 28 U.S.C. § 1253.

GROUNDS FOR AFFIRMANCE

The Commonwealth's own admissions, as well as other direct and circumstantial evidence adduced at trial, established that racial considerations predominated in the construction of District 3. Indeed, the State's own Jurisdictional Statement admits the racial motivation. J.S. 15. Defendant failed to meet its burden to prove that the racial construction of District 3 was necessary to avoid liability under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, *et seq.*, or was appropriately narrowly tailored to achieve a compelling state interest.

This case presents no novel or substantial issues. Based upon the overwhelming record before the District Court, this Court should affirm the judgment of the unanimous District Court. *See, Louisiana v. Hays*, 116 S. Ct. 2542 (1996) (summarily affirming a unanimous District Court panel that Louisiana District 4 was an unconstitutional racial gerrymander).

I. THE STATE ADMITTED, AND THE EVIDENCE ESTABLISHED THAT RACE PREDOMINATED IN THE CONSTRUCTION OF DISTRICT 3.

A. The Clearly Erroneous Standard of Rule 52(a) Is The Applicable Standard Of Appellate Review.

In evaluating voting rights cases involving an alleged racial gerrymander, the District Court must conduct a two stage, burden-shifting, analysis. First it must determine whether the Plaintiffs have proven that racial considerations predominated over other traditional, race-neutral districting principles. If the Court so finds, the

burden shifts to the defendant to prove that the racial decision-making was narrowly tailored to achieve a compelling governmental interest. *Vera v. Richards*, 861 F. Supp. 1304, 1336-1337 (S.D. Tex. 1994).

This Court reviews the findings of a District Court's application of both tests under the clearly erroneous standard. *See Miller*, 115 S. Ct. at 2488 (upholding a District Court's finding of racial gerrymandering as not clearly erroneous). *See also Rogers v. Lodge*, 458 U.S. 613, 622-627 (1982), (reviewing findings of whether an electoral system was maintained for discriminatory purpose is reviewable under clearly erroneous standard), *City of Rome v. United States*, 446 U.S. 156, 183 (1980) (finding whether an electoral system had a discriminatory effect reviewed under the clearly erroneous standard); and, *Voinovich v. Quilter*, 507 U.S. 146, 159 (1993) (findings of discriminatory intent reviewable under the clearly erroneous standard.) Virginia improperly attempts to recast the comparable findings of the Court below as questions of law. J.S. 18, note 6. This unsupported suggestion contradicts Rule 52(a), Fed. R. Civ. P. and this Court's prior jurisprudence.

The application of the clearly erroneous standard relies on the District Court's knowledge of the local political, economic and social conditions which provides this Court with an intimate understanding afforded by a local perspective of the voting practice under review. *Thornburg v. Gingles*, 478 U.S. 30, 79-80 (1986). The application of this standard of review gives proper deference to the District Court's "intensely local appraisal of the design and impact of the contested electoral mechanisms" which

"preserves the benefit of the trial court's particular familiarity with the indigenous political reality. . . . " *Gingles*, 478 U.S. at 80.

In the face of this clearly established rule of appellate review, Virginia mistakenly asserts that the District Court's factual findings are subject to *de novo* review, due to what the state asserts is a "misapprehension of the proper analysis to be applied to the evidence." J.S. 18, note 6. Appellant's suggestion that the District Court "misapprehended" its legal responsibilities is an obvious attempt to avoid the application of the clearly erroneous standard of review.

B. The District Court's Finding That Racial Considerations Predominated is Well-Supported by Both Direct and Circumstantial Evidence.

"A racially gerrymandered districting scheme, like all laws that classify citizens on the basis of race, is constitutionally suspect." *Shaw v. Hunt*, 116 S. Ct. at 1900. *See also Miller* at 115 S. Ct. at 2482-3; *Shaw I*, 509 U.S. at 657-8, and *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995). In *Miller*, this Court articulated:

> [t]he plaintiff's burden is to show, whether through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district.

Miller, 115 S. Ct. at 2491.

This Court held that the Plaintiff "must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, respect for political subdivisions or community defined by actual shared interests, to racial considerations." *Miller*, 115 S. Ct. at 2488. When the Plaintiff's evidence is cumulatively sufficient to prove by a preponderance of the evidence that racial considerations predominated, the District Court properly finds that the districting scheme is a "racial gerrymander." Such a districting scheme "cannot be upheld unless it satisfies strict scrutiny, our most rigorous and exacting standard of constitutional review". *Miller*, 115 S. Ct. at 2490.

At this point, the evidentiary burden shifts to the Defendants and "[t]o satisfy strict scrutiny, the State must demonstrate that its districting legislation is narrowly tailored to achieve a compelling interest." *Ibid.*

The plaintiffs carried their burden of showing that racial considerations predominated in the adoption of District 3. The District Court received substantial direct evidence of Virginia's racial motive in its intention to create District 3 to achieve an "effective" majority-minority district. J.E. 564. These include official declarations – admissions – contained in the § 5 submission; transcripts of public hearings, J.E. 84-979; transcripts of legislative debate, J.E. 980-1342; and contemporaneous newspaper articles J.E. 1343-1497.

The district was initially constructed by the legislature, was modified by recommendation of the Governor, and thereafter amended twice again, each time becoming

progressively more and more racially pure. Each change served the oft-stated racial purpose.

Virginia acknowledges, as they must, that "the state intended to create a majority-minority district" as reiterated in the Jurisdictional Statement filed with this Court (J.S. p.15).

The Court found that the State moved beyond race-conscious districting and subordinated traditional districting principles. The three-judge Court evaluated circumstantial evidence including maps showing contorted boundaries, P.E. 1, 3A-3FF, App. 1; population density, and the racial division of localities, P.E. 2A-2G, 7-9; proof of numerous split cities and counties, P.E. 10, App. 20; the meandering of District 3 across distinct regions, including Tidewater, Southside and Central Virginia, P.E. 1, App. 1; the hyper-technical contiguity based upon the connection of dispersed minority populations by using unpopulated connectors such as rivers and highway exit ramps; altering the historic structure of districts D.E. 30A, 30B, 30C, 30D; and the general bizarreness of District 3.

The Court below properly applied this Court's decision in *Arlington Heights* conducting a "sensitive inquiry into such circumstantial and direct evidence as may be available." *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977).

In *Arlington Heights*, this Court noted that an appropriate evidentiary inquiry is whether "a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action" (citing *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) and *Gomillion v. Lightfoot*, 364 U.S. 339 (1960)).

With this record the District Court correctly determined that "[e]vidence of legislative intent, the bizarre shape of the district, and the subordination of traditional districting principles" established the predominant racial motive. *Moon*, at 1146, J.S. App. 11.

C. Appellant's *Post Hoc* Rationalizations are Unsupported by the Evidence.

The Appellant presented anecdotal evidence that concerns other than race were also addressed while creating District 3. The Appellant asserts these interests include: (a) the allocation of military facilities among the congressional delegation, (b) protection of incumbents; and (c) the creation of a new congressional district in Northern Virginia. These issues were first offered with the underlying suit as an alternate explanation for the divisions of the localities, and the contorted expanse of District 3. None are supported by the evidence as truly important constraints at the time the district was created.

1. Allocation of Military Facilities.

The Appellant suggests that the district's bizarre shape was influenced by the State's wish to spread military facilities among various congressional districts. The Commonwealth achieved the same policy objective in the 1980s with no disruption to the boundaries of independent cities and counties. D.E. 1625. The maps offered by Defendant at trial indicate that, in every case, the alleged attempt to allocate military facilities involved nearby neighborhood splits that can only be described as racial.

A review of D.E. 37[4] shows that the sharp, contorted division of Norfolk is not in the same area of town as the naval facility. The state proposed no explanation for splitting a neighborhood by race in order to move a facility from one district to another.

2. Protection of Incumbents.

The Appellant suggests that the odd shape of the district, and correlation of racial division, was an intentional effort to "preserve the incumbencies of the senior members of Virginia's Congressional delegation" (J.S. 14), namely Rep. Herb Bateman, Rep. Owen Pickett and Rep. Norman Sisisky. J.S. 14, note 5. Senator Gartlan claimed a "partisan objective of maintaining the current Democratic majority in the Congress of the United States. . . . " J.S. 6. Even partisan objectives may not be accomplished by use of race as a proxy. *Vera,* 116 S. Ct. at 1972.

3. Creation of a New District In Northern Virginia.

Lastly, the State suggests that the creation of a new congressional district in Northern Virginia, the area of highest population growth, is somehow relevant to the racial division of the Tidewater region and Central Virginia. The obvious geographic expanse that separates

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[4] The mylar overlay for this exhibit depicts the Legislative Conferees' plan of 11/20/91. The 1993 adjustments, depicting the current plan, is located at D.E. 39 and D.E. 40.

Northern Virginia's population and the Tidewater population supports the District Court's rejection of this obviously *post hoc* rationalization.

While the state may have achieved some of their districting objectives identified *post hoc*, none are sufficient to overcome the Court's holding that race predominated. It can be fairly said that these objectives were ancillary or incidental to the overriding purpose of racial gerrymandering. The evidence presented to the District Court clearly established that "[r]ace was the criterion that, in the State's view, could not be compromised; respecting communities of interest and protecting Democrat incumbents came into play only after the race-based decision had been made." *Moon* at 1148 citing *Shaw v. Hunt*, 116 S. Ct. at 1901. Notwithstanding such arguments, which appear to have been created for the trial of this matter, the State could not show the trial court any evidentiary support for such claims.

II. VIRGINIA'S *POST HOC* ASSUMPTION OF SECTION 2 LIABILITY CANNOT EXCUSE DISTRICT 3

A. Standard of Review

In *Shaw II*, the clearly erroneous appellate review standard was applied to a court's findings with respect to a state's asserted compelling interest and to the issue of narrow tailoring. *See Gingles*, 478 U.S. at 80 (findings of voting dilution under Section 2 reviewable under the clearly erroneous standard).

In an attempt to avoid the application of the appropriate standard of review, the Appellant states that the

Court "misapprehended" the law in two distinct analyses under Section 2 and *Gingles*. J.S. 18. The Appellant alleges first, that the Court improperly required proof that Section 2 liability actually exists, instead of accepting as sufficient proof that the State had a strong basis in evidence of Section 2 liability; and second, that the Court applied an improper, federal standard of compactness.

As to the first alleged misapprehension, the application of the less demanding standard proffered by the State would lead to no different result in this case. Based upon the District Court's factual finding that the existence of the first prong of *Gingles* is "doubtful at best", (*Moon*, at 1149, J.S. App. 21) the Appellant cannot identify in the record sufficient evidence to meet even its own self-imposed, less demanding standard. There cannot be a strong basis in evidence of anything, that is "doubtful at best".

As to the second alleged improper legal conclusion, the Appellant is simply incorrect. The Court properly applied the requirements articulated in *Gingles* concerning compactness and simply disagreed with Appellant[5]. The Appellant asserts that District 3 meets the compactness requirements of § 2 because under Virginia law, the state has a less stringent standard for "compactness" and District 3 allegedly conforms to this looser standard. J.S. 13. The District Court properly rejected this assertion. To

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[5] The Appellant's suggestion of "no serious dispute that Virginia proved the existence of the first two prongs of the *Gingles* analysis" is a misrepresentation, that ignores the pleadings, the trial, and the contrary findings of the District Court, as to the first precondition.

accept the State's assertion is to resurrect the legal concept that State law preempts federal law. This argument has previously been rejected by this Court in an analogous situation. *Arlington Heights*, 97 S. Ct. at 562, n. 8. Lawful congressional districting must meet the requirements of both federal and state law.

The Court properly evaluated the evidence, and made its factual determination based upon a comprehensive record. The District Court held it "doubtful at best" that a compact majority-minority district D.E. 22A, 22E, 22H, 22L had been presented to the Court. Regardless of the Appellant's contention, the District Court's finding is reviewable by this Court under the clearly-erroneous standard and should be affirmed.

B. There Was No Strong Basis In Evidence That Section 2 Liability Existed.

Appellant asserts that § 2 of the Voting Rights Act requires the creation of District 3. The Appellant offered no other compelling government interest to support the racial creation of District 3.[6] J.S. App. 21-22.

When a state chooses to create a majority black district to avoid probable § 2 liability, the state must use a racially restrained, measured construction to prospectively remedy the Section 2 liability. To voluntarily implement racial policies, a governmental entity must have a "strong basis in evidence for its conclusion that remedial

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[6] Appellant makes no suggestion that § 5 of the Voting Rights Act requires the creation of District 3.

action was necessary." *Wygant v. Jackson Board of Education*, 476 U.S. 267, 277 (1986); *see also City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

For District 3 to be a constitutional, narrowly tailored, § 2 remedial district, the Appellant must have made proper findings that establish the existence of the three *Gingles* preconditions[7], and that under the "totality of the circumstances," members of a protected class "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. 42 U.S.C. § 1973(b). *See Shaw v. Hunt*, 116 S. Ct. at 1905. The Commonwealth was required at the time of each enactment in 1991, 1992 and 1993 to have a strong basis in evidence for

> [p]roper findings in this regard are necessary to define both the scope of the injury and the extent of the remedy necessary to cure its effect. . . . Absent such findings, there is a danger that a racial classification is merely the product of unthinking stereotypes or a form of racial politics.

Croson, 488 U.S. at 510.

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[7] The first *Gingles* precondition requires proof that the minority group is "sufficiently large and geographically compact to constitute a majority in a single-member district"; the second precondition requires proof that the local minority group votes in a "politically cohesive" manner; and third, the Plaintiff must prove that "the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *Thornburg v. Gingles*, 478 U.S. 50-51.

Dr. Weber's testimony showed the absence of credible evidence of legally significant white bloc voting. App. 21-22. Even the State's expert, Dr. Lisa Handley who analyzed 15 black-white legislative elections, determined that black candidates won nine. Dr. Steven Cole, a statistician offered as an expert by the Defendant-Intervenors analyzed 11 legislative elections in which blacks won nine. P.E. 31.

After a comprehensive review of the evidence, the unanimous finding of the District Court was that the facts necessary to preserve District 3 simply do not exist. The Court held that one of the *Gingles* preconditions, white bloc voting sufficient to usually defeat the candidate of choice of African-American voters, does not exist at all,[8] and that another *Gingles* pre-condition, the existence of a sufficiently numerous and compact minority population was "doubtful at best". *Moon*, at 1149, J.S. App. 21.

Indeed, maps show the dispersion of minority population into three distinct areas: Norfolk/Portsmouth, Newport News/Hampton, and Metropolitan Richmond. P.E. 17K, 17L, 17M, 17N, App. 5.

The absence of a strong basis in evidence is well supported on the record, is founded in the unique local knowledge of the three-judge District Court of the electoral realities of Virginia, and is properly affirmed by this Court.

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[8] The State offers new evidence that was not presented to the District Court in Tables 1 and 2 of the Appendix to the Jurisdictional Statement. The tables are unreliable and contain only a few selected contests. For a more detailed reprise of the extent of the reports of Drs. Handley and Cole see P.E. 31.

C. District 3 Is Not Narrowly Tailored To Meet an Alleged Section 2 Liability.

Assuming *arguendo* that compliance with Section 2 is a compelling governmental interest[9], the District Court's judgment in the instant case must nevertheless be sustained and this Motion To Affirm granted as the district is not narrowly tailored for the three reasons below.

1. District 3 Does Not Substantially Address a Real § 2 Claim.

Defendant-Intervenors assert that a "litany of litigation somehow establishes a broader Section 2 claim" beyond the local area of applicability. J.S. App. 21. The District Court recognized the wholly inconclusive nature of compromise consent agreements in a political context. *See also Croson*, 488 U.S. at 505 (The Court has "never approved the extrapolation of discrimination in one jurisdiction from the experience of another.") The propriety of the Court's disregard of these settlement agreements was confirmed by the pre-trial agreement to dismiss Section 2 claims against the City of Hampton, *Simpson v. City of Hampton*, No. 95-CV-0083 (E.D. Va. dismissed Nov. 15, 1996). One of the Plaintiffs in the City of Hampton case is Mr. Melvin Simpson who is a Defendant-Intervenor in this case.

An analysis conducted by Dr. Harold Stanley, the expert retained by the City of Hampton, in the dismissed case, bolsters the District Court's finding that dominating

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[9] *See Vera*, 116 S. Ct. at 1968 (O'CONNOR, J. concurring).

white bloc voting does not exist in the City of Hampton, one jurisdiction which was racially divided by District 3. P.E. 20.

District 3, like North Carolina's District 12, is located in a different location than the area in which the Section 2 liability arises. "The vote dilution injuries suffered by these persons are not remedied by creating a safe majority-black district somewhere else in the State." *Shaw II*, 116 S. Ct. at 1906. *See also Croson*, 488 U.S. at 507, (remedy "not linked to identifiable discrimination").

In this case, the District Court specifically noted that "[o]nly 5 of the 13 contested localities are partially, and none are wholly, in the Third district." J.S. App. 21. Thus, District 3 does not directly address the harm asserted, and can not reasonably be argued to be narrowly tailored to remedy the Section 2 liability asserted by the State in an attempt to avoid liability in this case.

2. Electorally, District 3 Is an Overly Safe District for Candidates of Choice of Black Voters.

The construction of District 3 relies upon the racial division of eleven of its seventeen jurisdictions to produce a minority population of 64% with a minority voting age population of 61%. *Moon*, at 1146, J.S. App. 14. No justification for a percentage so high appears anywhere within the record. Without analyzing the existing levels of voter turnout and white cross-over voting, the Commonwealth blindly constructed a district that was overly safe for any candidate preferred by black voters.

The excessiveness of the 64% level is revealed by the overwhelming victories of Governor Wilder, Rep. Scott and Rev. Jesse Jackson in the 1988 Democrat Primary. P.E. 22 at 80, 98, 106-107. Examining Rep. Scott's unsuccessful 1986 campaign for Congress in District 1, Dr. Weber indicated that based upon the white cross-over actually cast for Rep. Scott, he would have defeated the incumbent had the district included only a 40% black voting age population. P.E. 12. At the time the districts were drawn, the CAM/CAR system informed the legislature that reconstituted election returns showed that L. Douglas Wilder had won 76.6% of the vote in 1985 within the confines of the current District 3, and that he had received 76.0% in his 1989 contest. P.E. 22 at 107.

The continued success of black congressional candidates in Texas, Georgia, Florida, Indiana, and California in less racially pure districts confirms the excessiveness of the racial division of the population in Virginia. *See*, Cameron, Epstein and O'Halloran, *Do Majority-Minority Districts Maximize Substantive Black Representation in Congress?*, Am. Poli. Sci. Review 90, Dec. 1996, 794-812, wherein the authors estimate that in the South, any district that exceeds 40.3% African-American population is likely to elect a candidate of choice of black voters.

3. District 3 Disrupts Non-Racial Bases of Political Identity.

"Reapportionment is one area in which appearances do matter." *Shaw I*, 509 U.S. at 646. "District shape is not irrelevant to the narrow tailoring inquiry" because the racial dismantling of localities "cause constitutional harm

in so far as they convey the message that political identity is, or should be, predominately racial" *Vera*, 116 S. Ct. at 1962 and that the unnecessary division of existing political sub-division "disrupts non-racial bases of political identity." *Ibid.*

III. CONCLUSION

The Commonwealth set out to create a 60-65% black majority congressional district in 1991 by disregarding its long-standing traditions. The District Court correctly examined the admissions of the State, the direct and circumstantial evidence, and applied strict scrutiny in a manner consistent with this Court's jurisprudence. Plenary review is unnecessary.

Respectfully submitted,

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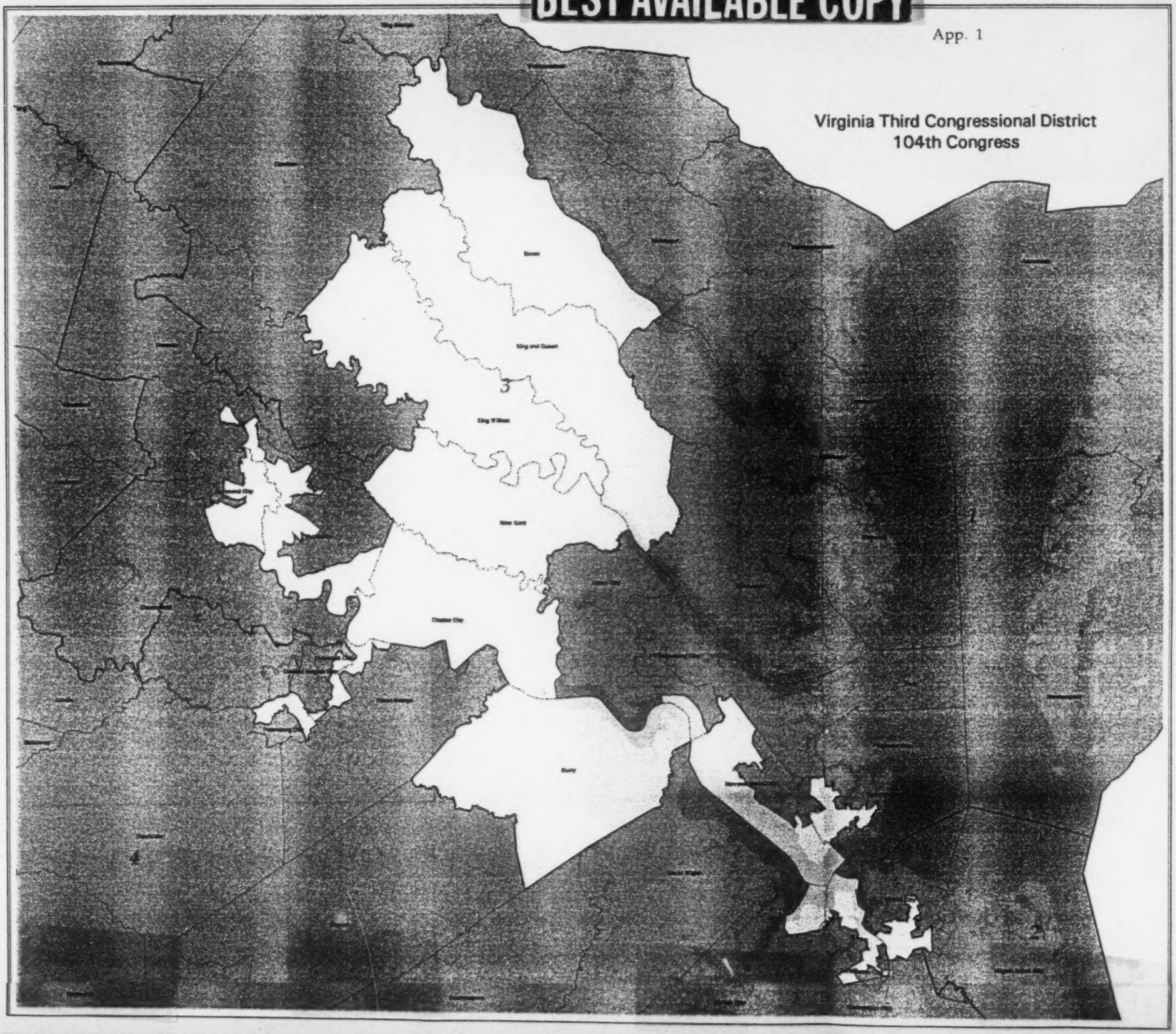
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App. 2

VIRGINIA CONGRESSIONAL DISTRICT 3



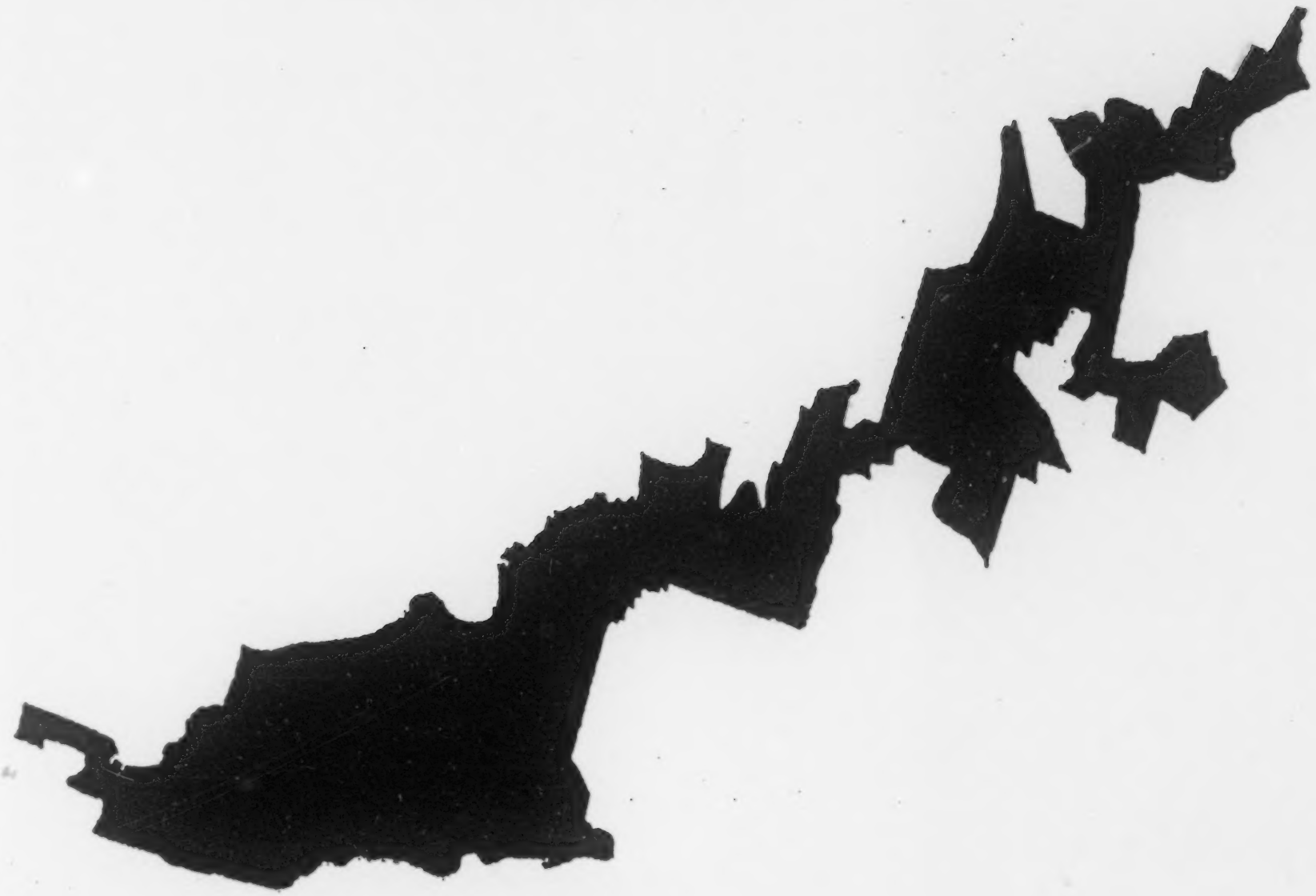
App. 3

GEORGIA CONGRESSIONAL DISTRICT 11



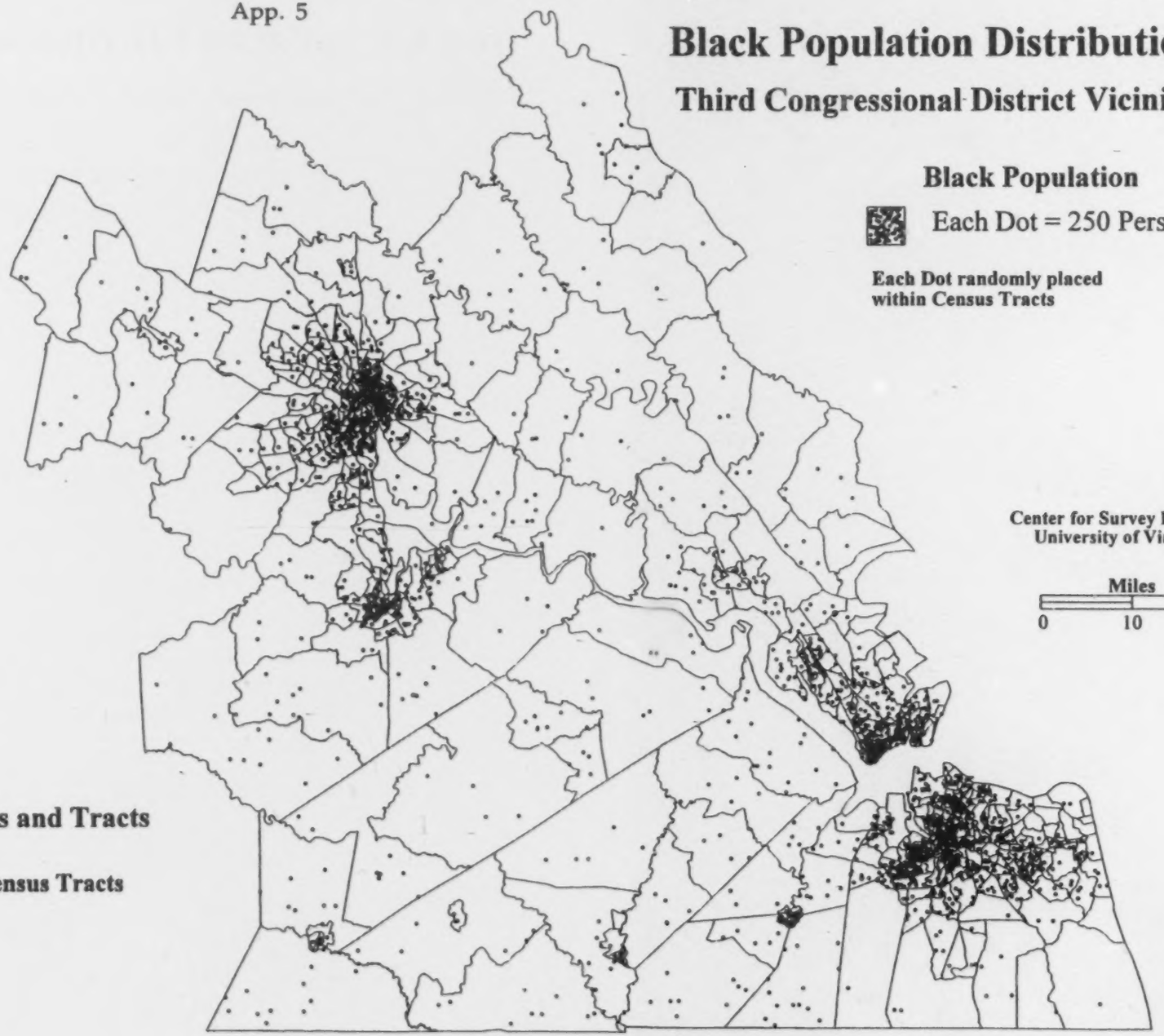
App. 4

LOUISIANA CONGRESSIONAL DISTRICT 4



Black Population Distribution

Third Congressional District Vicinity

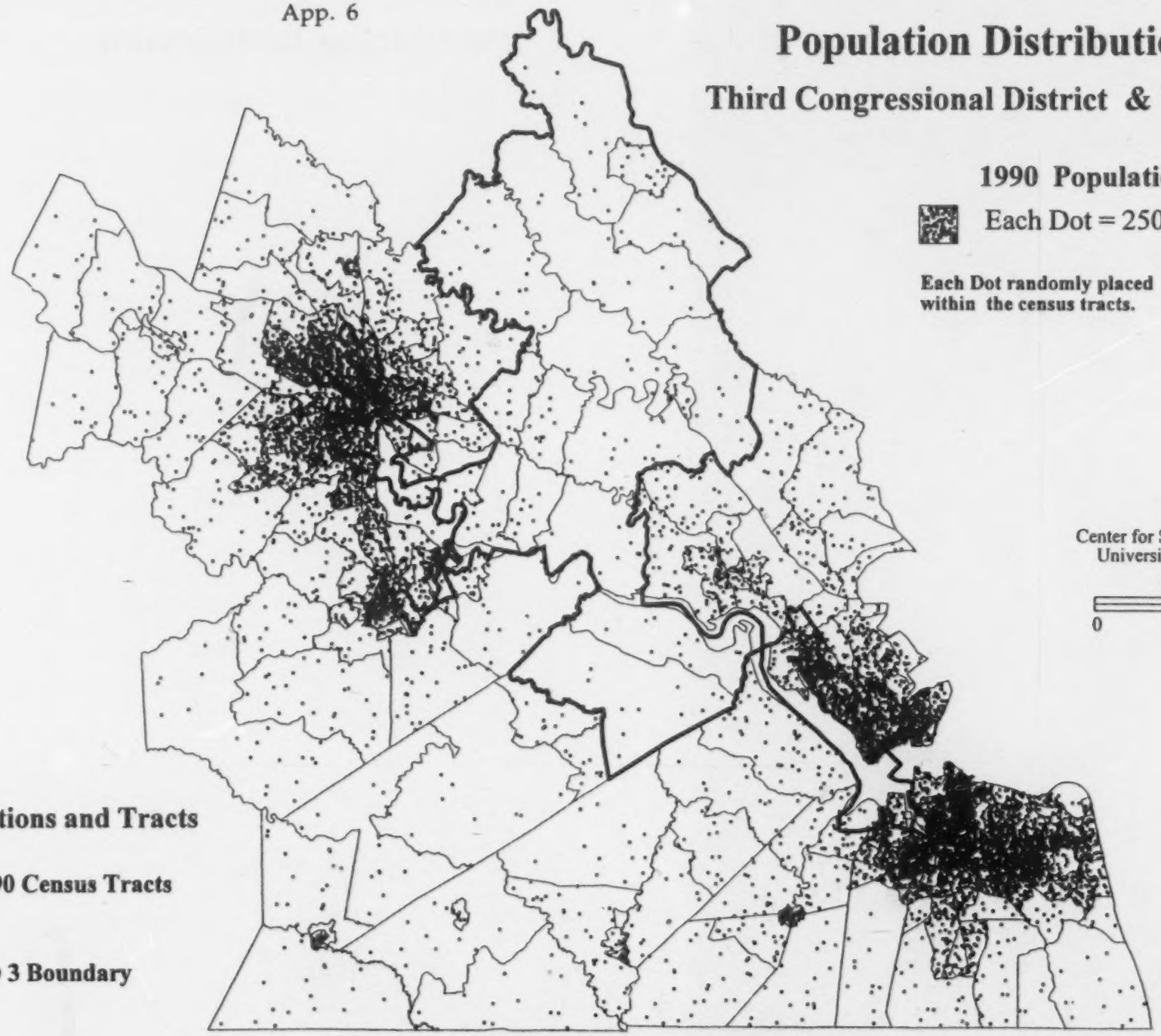


Sources: Population from U.S. Census Bureau 1990 STF3a CDROM. Tract and Political Boundaries from U.S. Census Bureau TIGER Files CDROM 1992.

PLAINTIFF'S EXHIBIT
171
3:95CV942

Population Distribution

Third Congressional District & Vicinity



1990 Population

Each Dot = 250 Person

Each Dot randomly placed within the census tracts.

Center for Survey Research
University of Virginia

Miles

0 10 20

Jurisdictions and Tracts

1990 Census Tracts

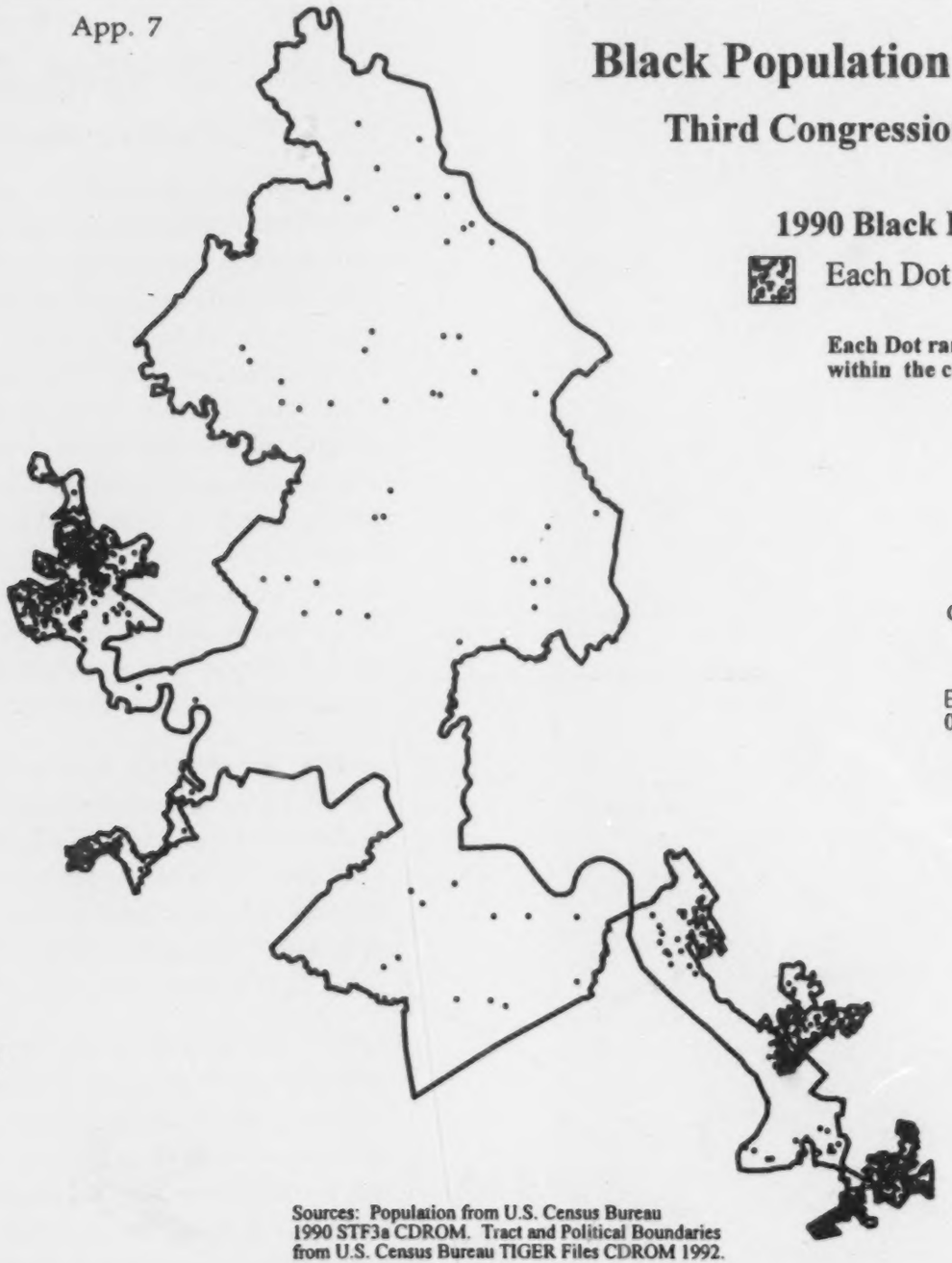
CD 3 Boundary

Sources: Population from U.S. Census Bureau
1990 STF3a CDROM. Tract and Political Boundaries
from U.S. Census Bureau TIGER Files CDROM 1992.

PLAINTIFF'S EXHIBIT
17B
3:95CV942

Black Population Distribution

Third Congressional District



1990 Black Population

Each Dot = 250 Person

Each Dot randomly placed within the census tracts.

Center for Survey Research
University of Virbinia

Miles

0 10 20

Jurisdictions and Tracts

Tracts (Partial) in CD 3

CD 3 Boundary

Sources: Population from U.S. Census Bureau 1990 STF3a CDROM. Tract and Political Boundaries from U.S. Census Bureau TIGER Files CDROM 1992.

PLAINTIFF'S EXHIBIT 170 3:95CV942

ATTACHMENT 3

STATEMENT OF THE CHANGE

Because the population of Virginia increased by nearly 16 percent since the last congressional redistricting, an additional, eleventh, congressional district was apportioned to the Commonwealth following the 1990 census. Between 1980 and 1990, Virginia's population increased from 5,346,818 to 6,187,358, an increase of 840,540 and a growth rate of 15.72 percent. Virginia's three major metropolitan areas accounted for the largest population growth: Northern Virginia 42.9 percent of the total growth, Newport News-Norfolk 27.2 percent, and Richmond 12.8 percent. Localities adjacent to these three metropolitan centers also experienced rapid growth. The growth was uneven, however, with the rural western and southside areas of the state either losing population or growing at a rate much slower than the rest of the state.

Virginia's eleven congressional districts are apportioned by Chapter 6, 1991 Va. Acts (Spec. Sess. II) ("Chapter 6"). The eleven districts include an open district (a district with no resident incumbent member of Congress) with majority black total and voting age populations, designated District 3, and an additional, new open district in Northern Virginia, designated District 11.

The addition of an eleventh congressional district caused the ideal population for a congressional district to remain relatively constant and minimized the potential changes in the areas of low growth. Extensive redrawing of district lines was necessitated in the remainder of the Commonwealth, however, to meet ideal population standards, establish a majority black district, and create a new

open district in the Northern Virginia area of highest population growth.

Western and Southside Virginia

This area covers present Districts 5, 6, and 9. These 3 districts were 66,050 below the ideal population level according to the 1990 census. District 9 contained the largest population shortfall (38,684) for an ideal district. Located in the far western corner of Virginia, new District 9 extended its eastern boundary into present District 5 (Carroll County) and present District 6 (portions of Roanoke County) to gain the necessary population. New District 6 in turn, added portions of Bedford County and the City of Lynchburg from present District 5 to reunite Lynchburg in District 6. A small portion of Rockingham County was moved from new District 6 to balance the district's total population.

The shift of the City of Charlottesville and nearly one-half of Albemarle County from present District 7 to new District 5 compensated District 5 for its population shifts to new District 6. As a result, meeting population equality requirements in the western region impinged on the rest of the Commonwealth only in the City of Charlottesville-Albemarle County area of present District 7.

Hampton Roads, Central and Eastern Virginia

This area includes present Districts 1, 2, 3, and 4. Each of the present congressional districts exceeded the ideal population, and the total excess population for the

region was 219,689. Changes made by Chapter 6 also involve portions of present District 7.

A major reason for changes in this region, other than to meet population standards, was the establishment of a district with black majority total (63.98 percent) and voting age (61.17 percent) populations. This new congressional district, designated District 3, draws black population concentrations from each of the four present districts and is described in detail in Attachment 4. The portions of new District 3 contributed by each of the present congressional districts are as follows:

District 1	36.1 percent
District 2	14.6 percent
District 3	35.4 percent
District 4	13.9 percent

No incumbent member of Congress resides in new District 3.

The dominant share of the population of present District 3, a total of 404,842, now is contained in new District 7. The remaining localities in new District 7 are drawn from present District 7. The incumbent Congressmen from present Districts 3 and 7 both reside in new District 7.

Present District 1 also is significantly affected by creating the black majority district. To restore population equality for District 1, portions of present District 7 (part of Hanover, Spotsylvania and Stafford Counties, and portions of the City of Fredericksburg) and present District 8 (portions of Stafford County) shift to new District 1.

New District 4 is compensated for its shift of population to new District 3 by adding population from present District 7 (Goochland and Louisa Counties), present District 3 (portions of Chesterfield County), and present District 2 (portions of the City of Virginia Beach). Predominantly black precincts in Norfolk were shifted from present District 2 to new District 3 without any necessary population adjustments for District 2.

Northern Virginia

This area includes present Districts 7, 8, and 10. (While only part of present District 7 actually is situated in the Northern Virginia metropolitan area, that district is directly involved in the changes affecting the Washington, D.C. suburbs.) The combined population for this fast growing area exceeded the ideal for three districts by 408,849.

The most notable change in this area is the creation of a new open congressional district, designated District 11, from portions of present Districts 8 and 10. District 11 includes approximately one-half the population of Fairfax County, all of the City of Fairfax, and most of eastern Prince William County.

District 8, in turn, is redrawn to become an "inner" Northern Virginia district situated east of new District 11. Arlington County, the City of Falls Church, and the McLean area of Fairfax County shift from present District 10 to join Alexandria and eastern and southeast Fairfax County in new District 8.

New District 10 becomes the Northern Virginia "outer" district, with over 60 percent of its population drawn from northern and western Fairfax County, western Prince William County and the two small cities it surrounds (Manassas and Manassas Park), and Loudoun County. The balance of the new District 10 is comprised of localities to the west, in the Northern Piedmont and Lower Shenandoah Valley, all of which were in present District 7.

Finally, new District 7 is composed predominantly of population (404,842) from present District 3. New District 7 includes 157,660 people drawn from Central Virginia localities which were in present District 7. The balance of present District 7 is dispersed to new Districts 1, 4, and 5 as described previously.

A list of equivalent old and new districts, showing the names of incumbent members of congress, is attached.

ATTACHMENT 4

STATEMENT OF ANTICIPATED MINORITY IMPACT

Virginia's first congressional district with a majority black total and voting age population was created by Chapter 6, 1991 Va. Acts (Spec. Sess. II). New District 3 contains a total black population of 63.98 percent and a black voting age population of 61.17 percent, percentages which the General Assembly felt ensured that black voters in the Commonwealth will be able to elect candidates of their choice. No incumbent member of Congress resides in new District 3.

As described in Attachment 3, new District 3 was created from predominantly black portions of four of Virginia's present congressional districts: Districts 1, 2, 3, and 4. The share of new District 3 drawn from each of these present districts is as follows:

District 1	36.1 percent
District 2	14.6 percent
District 3	35.4 percent
District 4	13.9 percent

An attached chart gives a more detailed description of new District 3.

Moving black population into new District 3 unavoidably reduced the black total and voting age populations in surrounding congressional districts. (A list of present and new districts showing black total and voting age populations also is attached). In spite of this unavoidable reduction, however, new District 4 remains a black influence district with a total black population of 32.09

percent and a black voting age population of 30.66 percent. In addition, Virginia's new congressional reapportionment slightly enhances the minority influence in new District 5. New District 5 has a total black population of 24.71 percent and a black voting age population of 22.86 percent.

Virginia has no statistically significant concentrations of other racial, Hispanic, or language minority populations.

COMPONENTS OF CHAPTER 6 DISTRICT 3

This chart shows the relationship between present congressional Districts 1, 2, 3, and 4 and creation of a black majority district, designated District 3 in Chapter 6. It shows for each district (1) the part included in New District 3 and (2) adjustments to compensate the district for the population shifted to District 3.

A. Present District 1

1. Included in Chapter 6 District 3

	Total	Black
Charles City	6,282	3,969
Essex	8,689	3,270
James City (part)	7,632	1,529
King and Queen	6,289	2,633
King William	10,913	3,310
New Kent	10,445	2,151
Richmond County	7,273	2,194
Hampton (part)	63,378	38,822
Newport News (part)	82,334	43,101
TOTAL	203,235	100,979
Percent of District 3	36.13%	28.06%

2. Adjustments Required to District 1

Added to bring District 1 within population deviation:

	Total	Black
Hanover (part)	34,942	3,598
Spotsylvania (part)	35,525	3,481
Stafford	61,236	4,304
Fredericksburg	19,027	4,115
TOTAL	150,630	15,498

3. Statistical:	Present	Chapter 6
Total Population	615,085	562,480
Percent Deviation	+ 9.35%	0.00%
Total Black	30.34%	17.98%
VAP Black	28.69%	16.87%

B. Present District 2

1. Included in Chapter 6 District 3

	Total	Black
Norfolk (part)	81,867	61,904
Percent of District 3	14.55%	17.20%

2. Adjustments Required in District 2
No additional population required to offset loss of part of Norfolk

3. Statistical:	Present	Chapter 5
Total Population	654,298	362,490
Deviation	+16.32%	0.00%
Total Black	23.95%	16.64%
VAP Black	22.41%	15.51%

C. Present District 3

1. Included in Chapter 6 District 3

	Total	Black
Henrico (part)	54,329	30,902
Richmond City (part)	144,740	106.373
TOTAL	199.969	137,275
Percent of District 3	35.39%	38.14%

2. Adjustments Required in District 3

18,150 (5,205 black) Chesterfield added to District 4. The balance of present District 3 is in Chapter 6 District 7 as follows:

	Total	Black
Chesterfield (part)	182,974	19,162
Henrico (part)	163,552	12,925
Richmond City (part)	58,316	5,749
TOTAL	404,842	37,836

3. Statistical:
Not Applicable

D. Present District 4

1. Included in Chapter 6 District 3

	Total	Black
Prince George (part)	1,877	313
Surry	6,145	3,411
Hopewell (part)	3,652	3,078
Petersburg (part)	24,756	20,370
Portsmouth (part)	38,871	31,671
Suffolk (part)	3,002	896
TOTAL	78,303	59,739
Percent of District 3	13.92%	16.50%

2. Adjustments Required in District 4
Added to bring District 4 within population deviation

	Total	Black
Chesterfield (part)	18,150	5,203
Goochland	14,163	4,210
Louisa	20,325	5,233
Virginia Beach (part)	9,941	1,174
TOTAL	62,579	15,820

3. Statistical:	Present	Chapter 6
Total Population	578,193	562,469
Percent Deviation	+2.79%	0.00%
Total Black	38.91%	32.09%
VAP Black	36.95%	30.66%

BLACK PERCENT OF POPULATION
OLD AND NEW DISTRICTS
(1990 CENSUS)

Number	Present District		Chapter 6 District	
	Total	Voting Age	Total	Voting Age
1.	30.34	28.63	17.98	16.87
2.	23.95	22.41	16.64	15.51
3.	28.99	27.13	63.98	61.17
4.	38.81	36.95	32.09	30.66
5.	23.86	22.11	24.71	22.86
6.	11.18	10.36	11.49	10.62
7.	10.76	10.34	10.08	9.44
8.	11.89	11.36	13.36	12.47
9.	2.60	2.53	2.48	2.42
10.	7.17	6.78	5.77	5.57
11.	N.A.	N.A.	8.18	7.46

TABLE 1

Proportion of Total Population in Split Counties and Independent Cities by Congressional District for 1991 Plan (C0723750)

County/City	CD	Total	White	%	African-Amer.	%
Hanover	1	34,842	30,943	88.8	3,598	10.3
James City	1	27,227	21,884	80.4	4,931	18.1
Spotsylvania	1	35,725	31,375	88.3	3,481	9.8
Hampton	1	70,415	55,095	78.2	13,159	18.7
Newport News	1	87,711	70,722	80.6	13,976	15.9
Norfolk	2	179,362	129,920	72.4	40,108	22.4
Virginia Beach	2	383,128	309,412	80.8	53,497	14.0
Henrico	3	54,329	22,728	41.8	30,902	56.9
James City	3	7,632	5,920	77.6	1,529	20.0
Prince George	3	1,877	1,490	79.4	313	16.7
Hampton	3	63,378	23,054	36.4	38,822	61.3
Hopewell	3	3,652	513	14.1	3,078	84.3
Newport News	3	82,334	35,696	43.4	43,101	52.4
Norfolk	3	81,867	18,308	22.4	61,904	75.6
Petersburg	3	24,756	4,142	16.7	20,370	82.3
Portsmouth	3	38,871	6,909	17.8	31,671	81.5
Richmond City	3	144,740	36,377	25.1	106,373	73.5
Suffolk	3	3,002	2,036	67.8	896	29.9
Chesterfield	4	26,300	17,894	68.0	8,034	30.6
Prince George	4	25,517	16,778	65.8	7,659	30.0
Hopewell	4	19,449	16,174	83.2	2,832	14.6
Petersburg	4	13,630	6,052	44.4	7,318	53.7
Portsmouth	4	65,036	46,303	71.2	17,509	26.9
Suffolk	4	49,139	26,475	53.9	22,349	45.5
Virginia Beach	4	9,941	6,996	70.4	1,174	11.8
Albemarle	5	32,180	28,080	87.3	3,710	11.5
Bedford	5	33,589	30,265	90.1	3,187	9.5
Bedford	6	12,067	11,591	96.1	425	3.5
Roanoke	6	67,247	64,698	96.2	1,812	2.7
Rockingham	6	51,017	49,742	97.5	852	1.7
Albemarle	7	35,860	31,184	87.0	3,114	8.7
Chesterfield	7	182,974	159,173	87.0	19,162	10.5
Hanover	7	28,464	25,497	89.6	2,807	9.9
Henrico	7	163,552	145,725	89.1	12,925	7.9
Spotsylvania	7	21,878	18,845	86.1	2,697	12.3
Richmond City	7	58,316	51,651	88.6	5,749	9.9
Fairfax	8	270,762	211,350	78.1	32,558	12.0
Roanoke	9	12,085	11,822	97.8	209	1.7
Prince William	10	81,674	73,479	90.0	5,484	6.7
Rockingham	10	6,465	6,418	99.3	17	0.3
Fairfax	10	138,947	123,293	88.7	5,304	3.8
Prince William	11	134,012	106,230	79.3	19,594	14.6
Fairfax	11	408,875	330,756	80.9	25,463	6.2

Source: Commonwealth of Virginia, U.S. Department of Justice Preclearance Submission, December 20, 1991, District Population Breakdown by Locality, Plan C0723750.

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TABLE 2

Proportion of Total Population in Split Counties and Independent Cities by County or Independent City for 1991 Plan (C0723750)

County/City	CD	Total	White	%	African-Amer.	%
Albemarle	5	32,180	28,080	87.3	3,710	11.5
Albemarle	7	35,860	31,184	87.0	3,114	8.7
Bedford	5	33,589	30,265	90.1	3,187	9.5
Bedford	6	12,067	11,591	96.1	425	3.5
Chesterfield	4	26,300	17,894	68.0	8,034	30.6
Chesterfield	7	182,974	159,173	87.0	19,162	10.5
Fairfax	8	270,762	211,350	78.1	32,558	12.0
Fairfax	10	138,947	123,293	88.7	5,304	3.8
Fairfax	11	408,875	330,756	80.9	25,463	6.2
Hanover	1	34,842	30,943	88.8	3,598	10.3
Hanover	7	28,464	25,497	89.6	2,807	9.9
Henrico	3	54,329	22,728	41.8	30,902	56.9
Henrico	7	163,552	145,725	89.1	12,925	7.9
James City	1	27,227	21,884	80.4	4,931	18.1
James City	3	7,632	5,920	77.6	1,529	20.0
Prince George	3	1,877	1,490	79.4	313	16.7
Prince George	4	25,517	16,778	65.8	7,659	30.0
Prince William	10	81,674	73,479	90.0	5,484	6.7
Prince William	11	134,012	106,230	79.3	19,594	14.6
Roanoke	6	67,247	64,698	96.2	1,812	2.7
Roanoke	9	12,085	11,822	97.8	209	1.7
Rockingham	6	51,017	49,742	97.5	852	1.7
Rockingham	10	6,465	6,418	99.3	17	0.3
Spotsylvania	1	35,525	31,375	88.3	3,481	9.8
Spotsylvania	7	21,878	18,845	86.1	2,697	12.3
Hampton	1	70,415	55,095	78.2	13,159	18.7
Hampton	3	63,378	23,054	36.4	38,822	61.3
Hopewell	3	3,652	513	14.1	3,078	84.3
Hopewell	4	19,449	16,174	83.2	2,832	14.6
Newport News	1	87,711	70,722	80.6	13,976	15.9
Newport News	3	82,334	35,696	43.4	43,101	52.4
Norfolk	2	179,362	129,920	72.4	40,108	22.4
Norfolk	3	81,867	18,308	22.4	61,904	75.6
Petersburg	3	24,756	4,142	16.7	20,370	82.3
Petersburg	4	13,630	6,052	44.4	7,318	53.7
Portsmouth	3	38,871	6,909	17.8	31,671	81.5
Portsmouth	4	65,036	46,303	71.2	17,509	26.9
Richmond City	3	144,740	36,377	25.1	106,373	73.5
Richmond City	7	58,316	51,651	88.6	5,749	9.9
Suffolk	3	3,002	2,036	67.8	896	29.9
Suffolk	4	49,139	26,475	53.9	22,349	45.5
Virginia Beach	2	383,128	309,412	80.8	53,497	14.0
Virginia Beach	4	9,941	6,996	70.4	1,174	11.8

Source: Commonwealth of Virginia, U.S. Department of Justice Preclearance Submission, December 20, 1991, District Population Breakdown by Locality, Plan C0723750.

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TABLE 13

Estimated White Cross-Over Rates in Southeastern Virginia Congressional Districts of the 1980s in Statewide General Elections for 1985 and 1989 (% of Group Crossing-Over)

Year	CD	Candidate of Choice	Weighted Regression White %	Extreme Case White %
1985	1	Baliles	33.2	42.5
1985	1	Wilder (B)	28.3	40.9
1985	1	Terry	43.7	51.7
1989	1	Wilder (B)	28.2	36.5
1989	1	Beyer	36.1	42.4
1989	1	Terry	54.9	60.1
1985	2	Baliles	36.8	45.6
1985	2	Wilder (B)	32.4	42.8
1985	2	Terry	43.2	51.8
1989	2	Wilder (B)	34.4	44.5
1989	2	Beyer	43.3	49.7
1989	2	Terry	59.4	64.3
1985	3	Baliles	32.0	38.0
1985	3	Wilder (B)	23.1	31.2
1985	3	Terry	45.6	50.8
1989	3	Wilder (B)	28.4	33.6
1989	3	Beyer	41.8	45.1
1989	3	Terry	41.8	44.3
1985	4	Baliles	36.9	43.0
1985	4	Wilder (B)	27.2	34.9
1985	4	Terry	46.0	50.9
1989	4	Wilder (B)	23.1	30.6
1989	4	Beyer	35.9	41.0
1989	4	Terry	57.6	61.2

Note: The cross-over rate of white voters is estimated through the use of weighted bivariate ecological regression and extreme case (homogenous) analysis for each of the elections.

TABLE 14

Estimated White Cross-Over Rates in Southeastern Virginia Congressional Districts of 1993 in Statewide General Elections for 1985 and 1989 (% of Group Crossing-Over)

Year	CD	Candidate of Choice	Weighted Regression White %	Extreme Case White %
1985	1	Baliles	40.8	43.5
1985	1	Wilder (B)	34.9	37.3
1985	1	Terry	49.8	52.0
1989	1	Wilder (B)	33.8	36.3
1989	1	Beyer	42.1	43.5
1989	1	Terry	55.5	56.4
1985	2	Baliles	42.7	45.3
1985	2	Wilder (B)	39.1	42.5
1985	2	Terry	48.4	51.4
1989	2	Wilder (B)	40.5	44.2
1989	2	Beyer	47.2	49.5
1989	2	Terry	62.3	64.2
1985	3	Baliles	14.2	46.4
1985	3	Wilder (B)	2.0	40.9
1985	3	Terry	30.2	55.3
1989	3	Wilder (B)	19.1	40.1
1989	3	Beyer	33.5	46.9
1989	3	Terry	48.7	60.9
1985	4	Baliles	39.9	42.7
1985	4	Wilder (B)	31.5	34.7
1985	4	Terry	48.5	50.9
1989	4	Wilder (B)	26.0	30.5
1989	4	Beyer	37.7	40.9
1989	4	Terry	57.7	60.7
1985	7	Baliles	37.3	39.6
1985	7	Wilder (B)	30.0	32.7
1985	7	Terry	49.6	51.3
1989	7	Wilder (B)	32.1	35.0
1989	7	Beyer	43.6	45.3
1989	7	Terry	42.6	46.0

Note: The cross-over rate of white voters is estimated through the use of weighted bivariate ecological regression and extreme case (homogenous) analysis for each of the elections.